Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,
Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

Petitioner was disbarred for making reservations for rental cars for judges in 1981-1984, pursuant to a major amendment to a disciplinary rule not promulgated until 1988; and for similarly making rental car reservations for non-judicial public employees, pursuant to a disciplinary rule which expressly covered only gifts to "a judge, official, or employee of a tribunal" and which, prior to the decision below, had never before been interpreted to apply to non-judicial public employees. When the judges and public employees failed to pay for the rental cars, petitioner's firm, after making attempts at collection, eventually paid the bills and debited petitioner's account. The questions presented are:

1. Does the Ex Post Facto Clause—which applies directly only to legislative acts—apply to a new rule announced by a court, when the court acts in a legislative capacity in promulgating the new rule?

2. Does the Ex Post Facto Clause—which applies in the criminal context—apply to the quasi-criminal penalty of disbarment?

3. Irrespective of the Ex Post Facto Clause, do the due process principles enunciated by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and its progeny, preclude the retroactive application of new and unforeseeable judicial constructions of disciplinary rules?

PARTIES TO THE PROCEEDINGS

Petitioner Oscar O. D'Angelo was respondent before the Supreme Court of Illinois. Respondent before this Court, the Illinois Attorney Registration and Disciplinary Commission, was petitioner below and commenced the disciplinary proceeding against D'Angelo.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Oscar O. D'Angelo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this case on December 15, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 126 Ill. 2d 45, 533 N.E.2d 861, and is reprinted in the appendix hereto ("App.") at 1a. The Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), App. 14a, and the three separate Opinions of the members of the Hearing Board, App. 26a, 45a, 70a, are unreported.

JURISDICTION

The final decision of the Supreme Court of Illinois was entered on December 15, 1988. App. 1a. A timely petition for rehearing was filed on January 19, 1989, and denied on January 30, 1989. App. 13a. On April 12,

1989, Justice Stevens entered an order extending the time in which to file a petition for certiorari to and including June 29, 1989. App. 75a. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C.A. 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10 of the United States Constitution provides, in pertinent part: "No State shall * * * pass any * * * ex post facto Law."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

At the time of the conduct in question, Illinois Disciplinary Rule 7-110(a) provided:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

As amended in 1988 and as applied to petitioner in the decision below, Disciplinary Rule 7-110(a) provides:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Rule 65(C)(4) of the Code of Judicial Conduct, incorporated by reference in amended Disciplinary Rule 7-110(a), was added in 1987, after the conduct at issue here. It provides:

> Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a bequest, favor, or loan from a relative; a wedding or engagement gift * * *;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan, only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Canon 9 of the Illinois Code of Professional Responsibility provides that "[a] lawyer should avoid even the appearance of professional impropriety."

STATEMENT OF THE CASE

This case involves the permanent disbarment of petitioner Oscar O. D'Angelo from the practice of law in the State of Illinois.

Petitioner is a distinguished and highly respected Chicago attorney who has principally practiced as a non-litigator throughout his career. A graduate of DePaul University Law School in 1956, he has practiced law for nearly 30 years. No complaint was ever filed against him prior to the disciplinary proceedings involved in this case. Tr. 31, 334.[1] Petitioner has long engaged in numerous worthwhile *pro bono* projects, giving of his time freely and extensively.[2] In addition, petitioner has been

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[1] References to "Tr." are to the Transcript of Proceedings before the ARDC Hearing Board.

[2] For example, petitioner was President for 10 years of the Near West Side Community Committee, a group devoted to ameliorating

appointed by three consecutive Chicago mayors as Chairman of the Near West Side Community Conservation Council, a position he has held for 27 Years. Tr. 84-86, 95, 210-211, 310-315.[3]

Petitioner's reputation for integrity and professionalism was described at the disciplinary hearings as "excellent" by the President of the State of Illinois Medical Center Commission, Tr. 385, 395-396, as well as by the Director of the Landmarks Preservation Council. Tr. 244, 254. The Chancellor of the University of Illinois at Chicago testified that petitioner was "one of the leading members and residents of the neighborhood community," with "a character of the utmost integrity." Tr. 452, 456. A partner and member of the Management Committee at the Chicago law firm of Mayer Brown & Platt stated that petitioner's reputation at the bar for integrity, truth and veracity was "excellent" and that his reputation in civic matters was "superlative," of the "highest order." Tr. 546, 549. He was described as a person of "the highest integrity" by a former partner who had worked with him

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juvenile delinquency problems, Tr. 314-316, and he was the first President of the Lay Advisory Council of Columbus, Cuneo and Cabrini Hospitals. Tr. 323-324. He was one of three founders of the University Village Association, conducting community awareness programs, Tr. 286-289, 316-318, 404-410, 454-455; a founder of the Landmarks Preservation Council, dedicated to preserving historic landmarks in Chicago, Tr. 244-247, 318-322, 324; a Board member of the Chicago School of Architecture Foundation, educating visitors on the city's architectural heritage, Tr. 325; a Board member of Friends of the Park, devoted to the enhancement of Chicago's parks, Tr. 322-323; and President of the Advisory Board of St. Mary's High School. Tr. 325. He has performed extensive *pro bono* work in attempting to control the proliferation of billboards, Tr. 250-254, 326-327, 378-379, and he has used his personal funds to aid numerous people in purchasing homes and starting businesses, without charging interest and often without requiring any repayment. Tr. 329.

[3] The Council helps exercise the power of eminent domain, carries out urban renewal projects, and protects the interests of the community. Tr. 311.

on both legal and *pro bono* matters, Tr. 522-527, 533, and the President and Chief Executive Officer of Rush Presbyterian St. Luke's Medical Center said he considered petitioner "a very distinctly honest individual." Tr. 284, 288.

The practice leading to the disciplinary proceedings that are the subject of this petition was begun more than 15 years ago, not by petitioner, but by his former partner, Robert Fiffer, at the law firm of Fiffer & D'Angelo. Fiffer, who represented Avis Rent-A-Car Systems, Inc. ("Avis"), made reservations for rental cars for friends, associates, clients and acquaintances, including judges and public employees.[4] When Fiffer died, petitioner joined the firm of Friedman & Koven, where he thereafter became a member of its Executive Committee. Tr. 46-47. Avis retained Friedman & Koven to represent it, and the firm, through the petitioner, continued the car rental practice begun by Fiffer.[5]

Over time, approximately 150 friends, partners, clients and business associates of Friedman & Koven and the petitioner were beneficiaries of the practice.[6] At first, making car reservations available was wholly haphazard —so much so that cars often were not where they should have been, and those being "benefitted" were in fact disappointed and disgruntled.[7] Therefore, Avis changed the arrangements so that Friedman & Koven issued Avis Company Travel Orders, or "ACTOS".[8] The use of ACTOs increased the likelihood that rental cars of the desired specifications would be available at the proper loca-

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[4] Tr. 62-64, 357-359, 362.

[5] Tr. 39-40, 47-48, 63-64, 295-297, 357-359. Petitioner is today a partner in the firm of Altheimer & Gray. Tr. 29, 42, 300.

[6] Tr. 62-63, 333, 493-494, 536. Recipients even included some of the firm's messengers and secretaries. Tr. 493-494.

[7] Tr. 63-66, 358, 417-419, 422, 432-434, 451.

[8] Ad. Ex. 5, 22-E (references to "Ad. Ex." are to the exhibits introduced before the Hearing Board by the ARDC Administrator); Tr. 62-68, 359, 434-437.

tion,[9] although the system remained haphazard and lacking in control.[10]

At no time was there anything secretive or furtive about the use of ACTOs; on the contrary, their use was common knowledge both inside and outside the firm. Tr. 351-352, 360-361, 449-450. While the intent was to have almost all of those renting cars pay for them, the issuance and follow-up on ACTOs were handled almost entirely by petitioner's secretaries, and they were not always successful in obtaining payment.[11] The secretaries would first make attempts to collect and, if they were unsuccessful, would call the situation to the attention of the firm's managing partner or the director of its accounting department.[12] Since the firm was, in effect, a guarantor of payment, initially it had to pay uncollected rental bills in order to protect its credit and its standing with its client, Avis.[13] When that occurred, the accounting department in turn often debited petitioner's personal firm account.[14]

Petitioner, however, did not contemporaneously keep track of either the issuance of ACTOs or attempts to collect unpaid bills. His secretaries expressed chagrin at their inability to direct his attention to these matters. Generally, petitioner would only become aware of a failed collection effort at the end of each fiscal period of the firm, when he would receive a handwritten ledger of his personal account with certain unpaid rentals appearing as charges against his account.[15] While petitioner com-

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[9] Tr. 66-69, 153, 169, 363-364, 419.

[10] Tr. 71-73, 362, 418-419, 451, 514.

[11] Tr. 62-68, 72-73, 150-151, 153, 169, 218, 231-232, 266-268, 277-278, 363-365, 381, 419-429, 433-451, 459-470, 475-480, 490-508.

[12] Tr. 73, 424, 426, 461, 463-467, 477-479, 508.

[13] Tr. 67-68, 334, 362, 365, 424, 464-465, 467, 477-478, 495-497, 508.

[14] Tr. 69-70, 469-470, 481-482, 500-502, 514-516, 518-519.

[15] Ad. Ex. 19-A; Tr. 352-353, 369-370, 438, 441, 467-470, 479-480, 500, 508, 528-529.

plained about these charges, he was extremely busy and impatient with details, and meetings with the firm's accounting department to discuss the charges generally did not take place.[16]

As noted, some of the 150 people who received ACTOs were judges. The six judges involved in this case were all personal friends of petitioner. He had known one of them all his life, and the others for from 15 to 30 years.[17]

There was virtually no testimony about two of these judges, who only reserved three car rentals between them.[18] The record does not indicate that the petitioner ever appeared before either of them. A third judge, with whom petitioner had gone to law school, entered a routine agreed order in 1981 dismissing a building court citation against him as part owner of a building for failure to obtain a subcontract permit for a licensed plumber, although the judge had no recollection of having done so. Two years later, petitioner made a rental car reservation for the judge. When the judge failed to pay, petitioner ended up paying for that rental.[19]

A fourth judge, who was a friend of long standing and before whom petitioner never appeared as a party or at-

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[16] Tr. 355, 369-370, 500-502. Petitioner's lack of knowledge of precisely what was happening is exemplified by the following testimony by one of his secretaries before the Hearing Board:

> Q. Did you believe that Mr. D'Angelo knew all the people for whom bills were being paid?
>
> A. Mr. D'Angelo didn't even know who was being ordered for, let alone being paid.
>
> Q. Do you believe that he wanted the bills that were being paid by the firm to be collected from the people who owed the bills?
>
> A. Yes. [Tr. 487-488.]

[17] Tr. 59, 93-94, 102-104, 146, 161, 168, 345-346.

[18] Tr. 93-94, 443, 484-485; *see* Ad. Ex. 22, 24. One of these two judges was born a few months after petitioner, lived as a child in the same apartment building as petitioner, and has been for his whole life one of petitioner's closest friends. Tr. 94.

[19] Ad. Ex. 23, 38; Tr. 90-93, 163-165.

torney, requested a car rental reservation for his son's wedding. Petitioner arranged for the rental and treated it as a wedding present to the son.[20] There were four additional rentals by that judge, the last two of which the judge mistakenly thought he had paid himself. This judge on occasion gave notice to petitioner's firm about how to administratively process jury summonses.[21] Another judge, a friend of many years, made two rental reservations through petitioner's office. Both petitioner and the judge assumed that the judge would pay for the cars rented, and the record does not indicate that either petitioner or his firm ever appeared before the judge.[22]

Another charge related to a sixth judge, who for a time was involved in a case affecting car rental companies. The City of Chicago in 1967 filed a complaint against several car rental companies, including Avis. The case centered around the question of who would be responsible for parking tickets left on rental cars. Tr. 50-54, 56-57, 78. First Fiffer & D'Angelo and then Friedman & Koven represented Avis in this matter. Although petitioner was not the primary attorney, he had filed an appearance and had counseled with Avis.

After the Illinois Supreme Court affirmed a denial of the car rental companies' motion for summary judgment, the case was assigned to Judge Richard LeFevour for pre-trial conferences. Tr. 54-57. Since proceeding with the litigation was impractical for all parties, those in-

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[20] This is permitted under the amended 1988 disciplinary rules applicable to lawyers and the 1987 rules applicable to judges.

[21] Ad. Ex. 20; Tr. 87-90, 105-119, 383, 427-429, 444-448.

[22] Ad. Ex. 21; Tr. 93-94, 146-156; *see esp.* Ad. Ex. 21(d) and (e). Petitioner never appeared as a party or as an attorney before five of these six judges who received ACTOs, although it is possible that other attorneys in his firm may have done so. Tr. 105-106, 108, 112-114, 148-149, 162-163, 171, 313-314, 350. In the only case a witness could specifically recall in which a Friedman & Koven partner appeared before one of these judges, the partner was a party and lost the case. Tr. 172-173.

volved fully expected a legislative solution to the underlying problem. Tr. 57, 347-348. In the meantime, the car rental defendants moved to dismiss the complaint on the basis that the practice of leaving tickets on empty, parked automobiles was not valid service of process. Tr. 58-59. Judge LeFevour never ruled on this motion, and a legislative solution was achieved.[23]

Months after the argument on the service-of-process question, Judge LeFevour called petitioner and said he was having trouble reserving a car in Phoenix. Tr. 61, 69, 77, 336, 496. Petitioner handled the matter in the same way he had for other friends, and an ACTO was issued to the judge. Tr. 77, 336, 493, 496. Thereafter, through calls to petitioner's secretaries, the judge obtained five additional reservations with a total rental for all six cars of approximately $2500. Tr. 69; Ad. Ex. 6-17.

Petitioner at no time offered or agreed to pay for these rentals, and the fact that he fully expected the judge to pay for them is attested to by subsequent events. When he found out that his firm was paying these bills, petitioner had dunning letters and invoices sent to the judge.[24] When the judge wrote petitioner about the bills, petitioner called and said the judge should pay them.[25] Only

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[23] Tr. 59, 349. This involved the payment of annual registration fees by car rental companies to provide a fund out of which parking tickets would be paid.

[24] Tr. 73-77, 336-337, 380, 497-498. As one of his secretaries testified:

> Q. Now as a general practice when you received bills from Avis in regards to Richard LeFevour, what would you do with them?
>
> A. In general, originally they were forwarded back to the judge's home, and then towards the latter stages we were having a problem and I probably took them up to Mr. Delman [a member of the firm's executive committee] because at that point Avis was threatening our credit line. [Tr. 511.]

[25] Ad. Ex. 15; Tr. 74-76, 336, 380, 498, 509-512.

after the judge assured him that the bills would be paid did petitioner agree to assist with additional ACTOs.[26]

Although there was no evidence whatever that petitioner was motivated by an intent to influence any decision of the judge,[27] petitioner recognizes that opposing counsel in the parking ticket litigation were entitled to know that he had assisted Judge LeFevour in obtaining car rentals, and that he should have so informed them.[28]

In 1986, a complaint was filed by the Administrator alleging that petitioner reserved rental cars for six judges, and that his law firm paid all or part of the rentals due and charged these amounts to petitioner's personal account in violation of various provisions of the Illinois Code of Professional Responsibility.[29] The complaint also charged that petitioner issued ACTOs to 14 non-judicial public employees (designated as "officials" in the complaint) in violation of the Code. Petitioner moved to dismiss this latter count on the ground that no provision of the Illinois Code of Professional Responsibility prohibited or dealt with making anything of value available to non-judicial public employees. The Hearing Board

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[26] Tr. 76, 336. Judge LeFevour's attorney has always insisted that the judge did intend, and still intends, to pay these bills. Tr. 336.

[27] In fact, on several occasions when Judge LeFevour asked petitioner to become actively involved in Richard M. Daley's campaign for State's Attorney, petitioner declined. Tr. 339-345.

[28] Judge LeFevour became the subject of a criminal investigation during 1984 and 1985, and petitioner cooperated with the United States Attorney by producing all relevant documents dealing with Judge LeFevour and Avis car rentals. Tr. 360-361, 371-372. At the Judge's subsequent trial, an exhibit was introduced reflecting Friedman & Koven's payments for Judge LeFevour's car rentals, a story to this effect appeared in the newspapers, and the firm thereupon discontinued issuing ACTOs altogether. Tr. 96-97, 351, 371-373.

[29] Count 11 of the complaint was subsequently dismissed. Tr. 24, 292-293. Prior to filing the complaint, the Administrator petitioned the Illinois Supreme Court for an immediate suspension of petitioner's license to practice law. The court denied the petition.

denied the motion and held that if the Administrator could prove "that any of the listed officials are acting in an adjudicative or quasi-judicial function vis-a-vis [petitioner's] private projects or those of his clients, the board could find that the cause of action was proved in violation of Rule 7-110(a)." February 19, 1986 Order of the Hearing Board, at 1-2. The Administrator, however, conceded that he had offered no evidence that any of these employees had ever acted in a judicial or quasi-judicial capacity, Tr. 282-284, and no member of the Hearing Board made such a finding. App. 26a, 45a, 70a.

Petitioner fully cooperated with the ARDC and its Hearing Board. Petitioner did not object to receiving some sanction, but argued that any sanction suspending him from practice or disbarring him would be grossly unjust and wholly inconsistent with prior precedents and therefore arbitrary. After an evidentiary hearing, the Hearing Board split three ways: the chairperson recommended a private reprimand, a second member recommended a one-year suspension, and the third member recommended disbarment. App. 26a, 70a, 45a.

The chairperson, calling this a case of first impression in Illinois, noted that the complaint had failed to allege, and no proof was offered, that petitioner knew or approved of the specific payments by his firm, that he knew for whom the bills were paid, that he intended to pay the bills, that he sought or received any benefit therefrom, or that any damage was caused by the payments. Further, there was no charge or proof of any *quid pro quo*. The chairperson also pointed out that petitioner had been a long-time friend of the six judges, and that he thought they had paid most of these bills. She concluded that in the light of prior disciplinary decisions, censure or reprimand would be the only sanctions that could be applied without depriving petitioner of due process of law. App. 43a.

The ARDC Review Board, after considering the split decision of the Hearing Board, recommended that peti-

tioner be suspended for two years. App. 23a. The Illinois Supreme Court, however, decreed that he be permanently disbarred from the practice of law. App. 12a. It ruled that he violated Disciplinary Rule 7-110(a), governing gifts to judicial officials, since his conduct did not fit within any of the express exceptions to the rule first announced by the court in its 1988 decision (issued subsequent to the oral argument in petitioner's case) in *In re Corboy*, 124 Ill. 2d 29, 528 N.E.2d 694. App. 10a.[30]

The court further found that petitioner violated Canon 9 of the Illinois Code of Professional Responsibility, which admonishes that a lawyer "should avoid even the appearance of professional impropriety." Although the court below had held, in an opinion released the same day as the decision below, that Canon 9 was "not a standard of discipline in itself but expresses * * * policy considerations," [31] the court nonetheless found that petitioner's conduct *did* separately violate Canon 9, because he "fashion[ed] himself a travel agent for judges *and at least 14 elected or appointed officials* * * *." App. 11a (emphasis added). Indeed, the court below relied on petitioner's providing rental car reservations to the non-judicial employees in imposing the ultimate sanction of disbarment, despite the fact that Rule 7-110(a) is by its terms limited to conduct involving judicial officials. App. 11a-12a.

Petitioner filed a timely petition for rehearing, objecting to, *inter alia*, the application to him of the newly-

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[30] The court below also concluded that petitioner violated Disciplinary Rule 1-102(a)(4) (engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation), Disciplinary Rule 1-102(a)(5) (engaged in conduct that is prejudicial to the administration of justice), and Illinois Supreme Court Rule 771 (brought the court and the legal professional into disrepute). These violations were, however, dependent on the finding of a violation of Rule 7-110(a), which the court below described as "the most serious charge against [petitioner], and the one upon which the other subsidiary charges stand." App. 7a.

[31] *In re Powell*, 126 Ill. 2d 15, 29, 533 N.E.2d 831, 836 (1988), *quoted* at App. 10a.

promulgated version of Rule 7-110(a), and the retroactive application to him of the new construction of the rule to cover non-judicial public employees. The court below denied rehearing.

Petitioner's federal constitutional claims were timely raised. These claims concern the unforeseen and unforeseeable retroactive application to him of a major amendment to a disciplinary rule not promulgated by the Supreme Court of Illinois until *after* briefing and argument of the case before that court; the retroactive application of a new interpretation—first announced in this very case—of a disciplinary rule expressly limited to judicial officials to apply to non-judicial public employees; and the decision of that court to rely on Canon 9 in ordering disbarment even though the court held on the very same day that the Canon was not a standard of discipline. The basis for petitioner's federal constitutional claims thus first arose with the decision of the Supreme Court of Illinois. In such a case, this Court has held that federal questions are adequately presented below when raised in a petition for rehearing before the state supreme court—the first opportunity at which they *could* have been raised. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930). *See also PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980).

Here, petitioner did just that with respect to his federal ex post facto and due process claims, expressly arguing in his timely petition for rehearing that the state court's "application of [its] recent amendment of Rule 7-110(a) to [petitioner's] past conduct with regard to the Circuit Court judges would violate the proscription against *ex post facto* laws and the requirements of due process contained in the Federal and Illinois Constitutions." [32] Petitioner devoted an entire section of his petition for rehearing to challenging the state supreme court's retroactive application to him of the new interpretation

[32] Petition for Rehearing in the Supreme Court of Illinois, at 14 n.14.

of the rule to cover non-judicial employees,[33] arguing that "retroactive application of the Court's ruling in this case regarding non-judicial public employees would similarly violate [petitioner's] constitutional rights." [34] The federal constitutional questions were thus properly presented below.

REASONS FOR GRANTING THE WRIT

The court below promulgated a new disciplinary rule governing gifts to judges four years after the events at issue in this case occurred, and then applied the new rule retroactively to disbar petitioner. The court also relied upon petitioner's providing rental car reservations to non-judges in imposing the ultimate disciplinary sanction, even though the rule under which petitioner was judged was expressly limited to judicial officials and had never before been interpreted or understood to cover non-judicial public employees. Finally, the court below relied upon Canon 9 in disbarring petitioner, even though the court decided—in an opinion announced the *same day* as the decision below—that the Canon simply expressed a policy and was not itself a standard of discipline.

At the time the events at issue in this case occurred, Illinois Disciplinary Rule 7-110(a) provided that "[a] lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal * * *." Although the rule appeared absolute, the Illinois Supreme Court itself has expressly recognized that "the limits of Rule 7-110(a) had not been defined and this lack of definition created uncertainty among practicing attorneys as to precisely what conduct Rule 7-110(a) prohibited." *In re Jones*, 125 Ill. 2d 371, 381, 532 N.E.2d 239, 244 (1988). Indeed, there was "considerable belief among members of the bar" that the rule did not establish a flat, *per se* ban on gifts to judges, but rather prohibited only those gifts "motivated by an intent to influence." *In re Corboy*, 124 Ill. 2d at 38, 45, 528 N.E.2d at 698, 701.

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[33] *Id.* Section C(2).

[34] *Id.* at 14 n.14.

The Illinois Supreme Court, recognizing that the bar was "without the guidance of precedent or settled opinion," clarified and defined the scope of the prohibition against giving gifts to judges in its 1988 opinion *In re Corboy*, 124 Ill. 2d at 45, 528 N.E.2d at 701—four years after the rentals at issue here. The court did so by abrogating the old rule and formally promulgating a new one. Where the old rule appeared absolute but was in fact understood to carry with it implicit exceptions and qualifications, the new rule codified certain exceptions and qualifications, and the court announced that henceforth no others would be recognized. By making certain qualifications explicit, the court in effect repealed any other implicit ones.

The court announced in *Corboy that* "we hereby amend Rule 7-110(a)" and that "[e]ffective as of the date of this opinion" the rule would provide that

> A lawyer shall not give or lend any thing of value to a judge, offivial, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office. [124 Ill. 2d at 46, 528 N.E.2d at 701.]

The court further explained that

> If the nature of an attorney's practice is such that a matter in which he is involved is likely to be involved in a court proceeding, then that attorney should be prohibited from making a gift to any judge who sits on the court where the case may be heard—circuit, appellate, or supreme. The same prohibition must apply if the lawyer, though he, himself, may not be likely to have a case involved in a court proceeding, is associated in the practice of law with another who is likely to have matters that will be so involved.
>
> It is also not proper to rationalize a judicial gift to a judge who may sit in probate or traffic, or in the criminal division, simply because the donor only tries

> cases in another division of the court. Under our rules, a judge is not a permanent fixture of any division, but is subject to reassignment by the chief judge. [124 Ill. 2d at 43-44, 528 N.E.2d at 700.]

The court recognized that "[w]e have only today held for the first time" that Rule 7-110(a) incorporated the limits of the Code of Judicial Conduct and no others, and that "[i]t would be unfair to apply the limitation we have today for the first time defined to [the *Corboy*] respondents' conduct in 1981." 124 Ill. 2d at 45, 528 N.E.2d at 701. Accordingly, the court declined to apply the new rule to the attorneys before it in *Corboy*, because they "certainly could not have been aware of the construction that we have, for the first time, placed on that rule in this opinion." 124 Ill. 2d at 49, 528 N.E.2d at 703.

Despite the court's declination to apply its newly promulgated rule in the case in which it was first announced, the court nonetheless expressly applied this unforeseeable rule to petitioner in the instant case. The court considered the charges against petitioner under Rule 7-110(a) "as amended *In re Corboy*," App. 7a, and found that none of the explicit exceptions added in *Corboy* applied to petitioner's case. In applying the amended rule retroactively to petitioner's past conduct, the court ignored the record below—which showed that petitioner had no case pending before 5 of the 6 judges at the time the car reservations were made and that it was not even likely that he ever would have cases pending before them—and "determined that [petitioner's] 'gifts' to these judges were not permissible under any of the exceptions provided by Rules 7-110(a) and 65(C)(4), [and] that [petitioner] violated Rule 7-110(a)." App. 10a.

Even more egregiously, the court below penalized petitioner for providing rental car reservations to non-judicial employees, even though Rule 7-110(a)—both as it existed at the time of the conduct and as amended in

Corboy—expressly covers only "a judge, official, or employee of a tribunal." The rule does not in any sense cover public employees not serving in the judiciary, nor is there any reason it would. As the Illinois State Bar Association noted in the *amicus* brief it sought to file in support of rehearing below, the Illinois Supreme Court in this case "has condemned conduct which the Code does not single out or even hint is improper."[35] Indeed, even respondent ARDC conceded that the charge of giving gifts to non-judicial employees was perhaps not within "the per se application of the rule," arguing instead that discipline was warranted because such conduct was covered by "the philosophy behind the rule." Tr. 283.

Even though a prohibition on giving gifts to non-judicial employees was wholly unforeseeable at the time of the conduct in question, the court below imposed the ultimate sanction of disbarment precisely because rental car reservations were made available to such employees. The court expressly distinguished petitioner's case from a recent one in which it had ordered only suspension[36] on the ground that petitioner's case involved "6 judges *and 14 public officials*," and was therefore "much more egregious" than cases involving only a judge.[37]

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[35] Brief of Amicus Curiae Illinois State Bar Association, *In the Matter of Oscar O. D'Angelo*, No. 66514, at 2.

[36] *In re Ketchum*, 124 Ill. 2d 50, 528 N.E.2d 689 (1988).

[37] App. 12a (emphasis added). Within a few months before and after petitioner's case, the court decided a number of cases involving transfers of value to judges which on their facts were more objectionable than petitioner's conduct with judges. *See In re Jones*, 125 Ill. 2d 371, 532 N.E.2d 239 (1988) (attorney who lent judge $15,000 during time when attorney's firm had cases pending in court division to which judge was assigned and who had previously appeared before judge as a party—not sanctioned because of insufficient proof of improper motive or benefit received); *In re Lane*, 127 Ill. 2d 90, 535 N.E.2d 866 (1989) (attorney who loaned judge $2,500 at time his firm had four cases pending before the judge and whose loan was crossed off the judge's ledger when the judge awarded $50,000 to class counsel represented by attorney —suspended for one year); *In re Karzov*, 126 Ill. 2d 33, 533 N.E.2d

Petitioner's conduct vis-a-vis non-judicial employees also formed the basis for the finding of a violation of Canon 9. The court below viewed petitioner's case as one exhibiting the exercise of "clout"—an activity it would "not condone or tolerate"—because rental car reservations were extended to "14 elected or appointed officials of the city of Chicago" in addition to judges.[38] Such reliance on Canon 9 was patently unforeseeable, not only because no disciplinary rule covers non-judicial employees, but also because Canon 9—as the court below confirmed on the same day it announced the decision in this case—is not a standard of discipline but simply expresses policy considerations. App. 10a.

The court's action contravened the express prohibition in Article I, Section 10 of the United States Constitution that "[n]o State shall * * * pass any * * * ex post facto Law." That clause is fully applicable here because the court below exercised its legislative powers in promulgating the new rule which it applied retroactively to petitioner, and because the disbarment of an attorney is analogous to a criminal proceeding for purposes of the Ex Post Facto Clause. The court's action also violated the Due Process Clause of the Fourteenth Amendment, which prohibits the imposition of punitive sanctions on the basis of retroactive application of an unforeseeable judicial construction enlarging the scope of prohibited conduct.

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856 (1988) (attorney who had been appointed by judge as counsel for a receiver, awarded attorneys' fees by the judge in connection with that representation, and lent judge $1,000 on same day the receivership was terminated—suspended for eighteen months); *In re Ketchum, supra* (attorney who lent judge at least $9,000 during time period 20% to 50% of his practice involved cases pending in the division over which the judge presided—suspended for two years). Clearly, petitioner's conduct with regard to the 14 non-judicial public employees was a very major factor in determining that disbarment was an appropriate sanction.

[38] App. 11a. Nowhere in the record is there any testimony as to these individuals' personal or business relationship with petitioner or his firm.

I. This Court Should Resolve The Recurring Question Whether The Ex Post Facto Clause Applies To Legislative Acts Of A Court.

This Court has held that the Ex Post Facto Clause applies directly only to legislative acts,[39] and petitioner in no way seeks reconsideration of that holding. The question presented by this case, however, is whether the Clause applies to legislative acts performed by a court—whether the Clause precludes a court *acting in a legislative capacity* from promulgating rules with retroactive effect that penalize conduct not previously prohibited. Although this question arises repeatedly in challenges to judicial rulemaking, it has not yet been—but should be—definitively decided by this Court.

As an initial matter there can be no question that the court below, when it issued the new disciplinary rule in *Corboy*, was acting in a legislative capacity. The Supreme Court of Illinois, like the courts of last resort of most if not all States, has the authority to act like a legislature in enacting rules governing the conduct of attorneys practicing before it. Indeed, that court recently reaffirmed that it has the "sole authority to regulate and discipline attorney conduct" and " 'possesses the inherent and exclusive power to regulate the practice of law in this State.' " *People ex rel. Brazen* v. *Finley*, 119 Ill. 2d 485, 492-493, 519 N.E.2d 893, 901-902 (1988) (quoting *In re Mitan*, 119 Ill. 2d 229, 246, 518 N.E.2d 1000, 1008 (1987)). The *Brazen* decision concerned the attempted exercise of rulemaking power by a lower court, but it relied upon and reaffirmed the earlier decision of *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899), in which the court expressly held that the power to regulate the bar rested with the state supreme court, and not the legislature.

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[39] *See, e.g., Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Ross* v. *Oregon*, 227 U.S. 150 (1913); *Frank* v. *Mangum*, 237 U.S. 309 (1915).

Part of the Illinois Supreme Court's exclusive power is the power to prescribe rules governing attorney conduct. *See In re Mitan*, 119 Ill. 2d at 246, 518 N.E.2d at 1008 (1987). The exercise of that power is a legislative act, and the court has in fact promulgated a Code of Professional Responsibility governing attorneys in Illinois. In short, the authority to *legislate* concerning the conduct of attorneys in Illinois rests with the Illinois Supreme Court, and nowhere else. As the court itself has ruled. "[t]he duty and authority of the court to safeguard the public interest and maintain the integrity of the legal profession does not depend upon legislative authorization or other approval." *In re Mitan*, 119 Ill. 2d at 246, 518 N.E.2d at 1008.

This Court has recognized that state courts can legislate, and has expressly held that state courts exercise legislative rather than adjudicatory powers in promulgating disciplinary rules. In *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), the Court ruled that the Virginia Supreme Court and its Chief Justice were entitled to immunity *as legislators* in a suit challenging their promulgation of particular provisions of the Virginia Code of Professional Responsibility. This Court noted that "propounding the Code was not an act of adjudication but one of rulemaking," *id.* at 731, and that disciplinary rules

> "are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature." [*Id.*, quoting 470 F. Supp. 1055, 1064 (E.D. Va. 1979) (Warriner, J., dissenting).]

This Court held that the members of the state court "are the State's legislators for the purpose of issuing the Bar Code," and should enjoy the immunity of legislators.[40]

The Illinois Supreme Court exercised its legislative power in *Corboy*. It did not simply decide the case before it, but expressly announced a new rule of general applicability. The fact that the court was exercising legislative rather than adjudicatory power was confirmed by its decision *not* to apply the new rule to the attorneys before it in *Corboy* itself. *See Mistretta v. United States*, 109 S. Ct. 647, 665 (1989) ("*all rulemaking is nonjudicial* in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action") (emphasis added); *Griffith* v. *Kentucky*, 107 S. Ct. 708, 713 (1987) (refusal to apply new rule of law to pending cases would be tantamount to exercise of legislative power).

When courts issue rules to govern the conduct of the bar they are acting in a legislative capacity, and the constitutional rules applicable to legislative acts should apply with full force to the promulgation of the rules. Just as in *Consumer Union*, where the immunity of legislators was applied to a court acting in a legislative capacity, so too here the Ex Post Facto Clause—normally applied to the conduct of legislators—should be applied to the legislative acts of the court below.

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[40] 446 U.S. at 734. Other courts have consistently held that "[t]he promulgation of rules and amendments thereto is a *legislative act of the court*, and the rules have the force of statutes." *Degen* v. *General Coatings, Inc.*, 705 S.W.2d 734, 735 (Ct. App. Tex. 1986) (emphasis added). *See, e.g., Harriatt* v. *Lillo*, 452 F. Supp. 421, 423 (D.N.J. 1978) ("when the [New Jersey] Supreme Court acts by rule of administration * * * it acts as a legislature passing a statute"); *Waldo* v. *Lakeshore Estates, Inc.*, 433 F. Supp. 782, 787 (E.D. La. 1977) ("A court acting in its adjudicative capacity may hear a challenge to the legitimacy of a rule it has promulgated pursuant to the quasi-legislative function of regulating the practice of law at bar").

II. This Court Should Resolve The Recurring Question Whether The Ex Post Facto Clause Applies To Disbarment Proceedings.

This Court has held that the Ex Post Facto Clause does not apply to civil proceedings,[41] even though there is nothing in the text of the Clause that would suggest such a limitation.[42] Indeed, Justice Jackson has remarked in an opinion for the Court that this doctrine as an "original proposal[] might be debatable," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952), and the Court in fact applied the Clause in the civil context in several landmark opinions before settling on the now-established view.[43]

This case, however, does not present a challange to the general rule. The issue here is not whether the Ex Post Facto Clause should apply in the civil context, but whether it should apply in the quasi-criminal context of disbarment proceedings. This Court has recognized that such proceedings are *not* typical civil actions but rather "adversary proceedings of a quasi-criminal nature," and that disbarment, although it may be intended to protect

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[41] *See, e.g., Calder* v. *Bull*, 3 U.S. (3 Dall.) at 390; *Bankers Trust Co.* v. *Blodgett*, 260 U.S. 647 (1923); *Galvan* v. *Press*, 347 U.S. 522 (1954).

[42] *See Marcello* v. *Bonds*, 349 U.S. 302, 319-320 (1955) ("The Constitution places a ban on all *ex post facto* laws. There are no qualifications or exceptions") (Douglas, J., dissenting). *Contrast, e.g.*, U.S. Const. amend. VI ("In *all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial * * *") (emphasis added).

[43] *See, e.g., Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1987). As one commentator has argued, "if the objective of insuring that legislatures operate only prospectively when rights of individuals might be adversely affected is to be served in any meaningful sense, the constitutional inhibition of ex post facto laws cannot be restricted to penal legislation." L. Tribe, American Constitutional Law 637 n.30 (2d ed. 1988).

the public, "is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550-551 (1968).[44]

The Circuits have had considerable difficulty in categorizing disbarment proceedings, and have adopted several different, conflicting formulations. The District of Columbia, Fifth and Eighth Circuits have recognized that such proceedings are quasi-criminal in nature,[45] while the Third, Seventh, and Ninth Circuits have simply ruled that they are neither criminal nor civil.[46] The Second Circuit has held that a "court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding," since "for most attorneys the license to practice law represents their livelihood, the loss of which may be greater punishment than a monetary fine." *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209-10 (2d Cir. 1972).

Presumably because disbarment proceedings are not technically criminal adjudications, some courts have

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[44] *Cf. Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 493 (1985) (considering civil RICO suit "quasi-criminal" would "requir[e] protections normally applicable only to criminal proceedings"). *See also Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 438 (1982) (referring to "the quasi-criminal nature of bar disciplinary proceedings") (Brennan, J., concurring).

[45] *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988) ("attorney disbarment and suspension cases are quasi-criminal in character"); *Charlton* v. *FTC*, 543 F.2d 903, 906 (D.C. Cir. 1976) ("disciplinary proceedings are 'adversary proceedings of quasi-criminal nature,' ") (quoting *In re Ruffalo*, 390 U.S. at 551); *Goodrich* v. *Supreme Court of South Dakota*, 511 F.2d 316, 318 n.4 (8th Cir. 1975) ("State disbarment proceedings are * * * quasi-criminal in nature").

[46] *In re Ross*, 735 F.2d 1168, 1170 (9th Cir. 1984) ("nature of a disciplinary proceeding is neither civil nor criminal"); *In re Abrams*, 521 F.2d 1094, 1099 (3d Cir. 1975) ("Although a disbarment proceeding is not criminal in nature, it has consequences which remove it from the ordinary run of civil case"); *In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970) ("disbarment and suspension proceedings are neither civil nor criminal in nature").

held that the Ex Post Facto Clause is not applicable.[47] At the same time, however, other courts have been unwilling to permit the severe sanction of the loss of livelihood to be imposed retroactively for conduct that was not barred when it took place. They have accordingly applied the principles of the Ex Post Facto Clause to disbarment proceedings through the Due Process Clause.

To cite a very recent example, in *Sexton* v. *Supreme Court Committee on Professional Conduct*, 747 S.W.2d 94 (Ark. 1988), an attorney was charged with violating a rule of professional conduct that was not in existence at the time of his conduct. The Supreme Court of Arkansas concluded that "[d]ue process requires notice that an act is punishable at the time it is committed." *Id.* at 96. There was no suggestion that the attorney's conduct was not improper prior to the adoption of the new rule, and in fact the court conceded that "Sexton should have been charged under the rule in effect at the time of the alleged misconduct." *Id.* Nonetheless, his conduct could not be examined retroactively under a new rule.

Another case similar to the one at bar dismissed an ex post facto challenge to the removal of a judge, but then invoked ex post facto principles under the rubric of due process to bar the retroactive application of a new rule of judicial conduct. In *In re Inquiry Concerning A Judge*, *supra*, a judge being disciplined was accused of various acts of judicial misconduct. At the time of his conduct, the rule in Florida was that a judge could not be removed from office unless he was guilty of misconduct and "he committed it with a corrupt motive." 357 So. 2d at

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[47] *See, e.g., In the Matter of Randall*, 640 F.2d 898, 905 (8th Cir. 1981) ("the ex post facto clause and concept is only applicable in criminal cases"); *In the Matter of Leifer*, 407 N.Y.S.2d 1 (A.D.2d 1978) (same); *Nicholson* v. *Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky. 1978) (same); *In re Inquiry Concerning a Judge*, 357 So.2d 172 (Fla. 1978); *cf. Arthurs* v. *Board of Registration*, 418 N.E.2d 1236 (Mass. 1981) (physician disciplinary proceedings fall outside the scope of the ex post facto doctrine).

180. After the conduct at issue, however, the rule was amended to delete any requirement of a corrupt motive—much as the Illinois Supreme Court in *Corboy* amended the rule at issue in this case to delete any intent requirement. The judge being disciplined asserted that the record reflected that he had been sincerely attempting to carry out his duties and had not been motivated by any desire for personal advancement, that he therefore had not violated the rule in effect at the time, and that the new rule could not be retroactively applied to him.

The court ruled that the Ex Post Facto Clause was not applicable, because it only applied to criminal cases. *Id.* at 180. The court nonetheless held that applying the new rule to the judge would violate due process:

> Any other conclusion would expose judicial officers to the unfair and untenable situation in which even innocent acts of today could someday be declared improper and subject them to punishment or removal from office. * * * Judicial officers are justified in relying on the current rule and in conducting themselves accordingly. [*Id.* at 181.]

This is, of course, quite simply the application of the Ex Post Facto Clause under another name. Petitioner below relied upon both the Ex Post Facto Clause and the Due Process Clause of the Federal Constitution in protesting the retroactive application of the new rule announced in *Corboy* as well as the new rule concerning non-judicial employees announced in this very case. *See supra* at 13-14. While some courts do not apply the Ex Post Facto Clause to disbarment proceedings because they are not, strictly speaking, criminal adjudications, *see* note 47 *supra*, others recognize the unfairness of such an approach and apply the same principles under due process.

This Court itself recently emphasized the importance of prior notice that conduct is prohibited before that conduct can form the basis for disbarment as opposed to other, lesser sanctions. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court noted

the vagueness in a bar advertising rule, but found "no infirmity" in a decision to issue a public reprimand to an attorney for violating the rule. *Id.* at 653-654 n.15. At the same time, however, the Court stressed that " '[a] relevant inquiry in appraising a decision *to disbar* is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed,' " [48] and that "it may well be" that disbarring an attorney for the same violation "would raise significant due process concerns." 471 U.S. at 653 n.15.

This Court should recognize the tension that has arisen from the strict limitation of the Ex Post Facto Clause to criminal cases and the judicial efforts to avoid patently unjust results caused by that limitation. The Court should grant the writ to clarify the extent to which the Ex Post Facto Clause or the principles animating the Clause apply to disbarment proceedings.

III. This Court Should Reconfirm That Due Process Prohibits Unforeseeable Judicial Expansion Of Punitive Provisions.

Even if this Court should determine that the Ex Post Facto Clause is not directly applicable, it should grant the writ to reconfirm its prior holdings that the Due Process Clause of the Fourteenth Amendment precludes the retroactive application of an unforeseeable judicial expansion of punitive provisions. Simply put, an individual may not—consistent with due process—be punished for conduct that was not prohibited when it occurred. When courts unforeseeably expand rules to embrace conduct not previously covered, due process forbids the retroactive application of the new interpretation.

This Court first articulated the principle in *Bouie* v. *City of Columbia*, *supra*, a case challenging the trespass convictions of civil rights demonstrators following a

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[48] *Id.* (quoting *In re Ruffalo*, 390 U.S. at 554 (White, J., concurring in the result)) (emphasis added).

sit-in. Although the trespass statute by its terms prohibited only unpermitted entry, the South Carolina Supreme Court had affirmed the demonstrators' convictions on the basis of a novel statutory interpretation that extended the prohibition to the act of remaining on premises after notice to leave. This Court reversed, concluding that this construction was too unexpected to provide the individuals fair warning that their conduct violated the law.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. * * * Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. [378 U.S. at 352-354.]

According to the Court, due process barred "retroactive criminal prohibitions emanating from courts as well as legislatures." *Id.* at 354.

The principle of *Bouie* applies not only to narrow statutory language that is given an unforeseeably expansive interpretation, but also to broad statutory language that is applied in an unforeseeable manner, even if the application is technically within the scope of the broad language. In *Douglas* v. *Buder*, 412 U.S. 430 (1973), for example, this Court considered a state law that required probationers to report any arrests or face revocation of their probation. The probationer failed to report a traffic citation, and the state attempted to revoke his probation. The state courts upheld revocation, construing "arrest" to include the receipt of a traffic citation. This Court reversed, ruling that "the unforeseeable application of [the state court's] interpretation in the case before us deprived petitioner of due process." *Id.* at 432. The Court specifically noted that "no prior * * * decisional law" supported the contention that a traffic citation could be considered an arrest.

This reasoning is directly applicable here. Although the disciplinary rule in effect in 1981-1984 appeared to prohibit *any* gift, just as the statute in *Douglas* appeared to require the report of *any* arrest, it was not understood to apply to gifts not intended to influence decisions, just as "all arrests" in *Douglas* was not understood to apply to traffic citations. Just as the unforeseeable application of the facially broad language in *Douglas* could not be retroactively applied, so too here the unforeseeable construction of the disciplinary rule in *Corboy* cannot be retroactively applied, despite the facially broad language of the prior rule.

Significantly, this Court in *Douglas* applied the *Bouie* analysis to a probation revocation proceeding, even though such proceedings are *not* criminal trials.[49] The protections enunciated in *Bouie* are thus fully applicable regardless of the characterization of a disbarment proceeding.

The concern about fair notice underlying both the Ex Post Facto Clause and the *Bouie* principle is especially implicated by facially broad language subject to unforeseeable judicial construction. *Marks* v. *United States*, 430 U.S. 188 (1977), involved an obscenity statute drafted in "sweeping language" which had been narrowed by judicial gloss and then broadened by a later interpretation. This Court declined to permit retroactive application of the broader construction, noting that the "fair warning" principle underlying the Ex Post Facto Clause was "fundamental to our concept of constitutional liberty" and "[a]s such, that right is protected against *judicial action* by the Due Process Clause of the Fifth Amendment." [50]

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[49] *See, e.g., United States* v. *Simmons*, 812 F.2d 561 (9th Cir. 1987); *Prellwitz* v. *Berg*, 578 F.2d 190, 192 (7th Cir. 1978); *United States* v. *Williams*, 558 F.2d 224 (5th Cir. 1977); *People* v. *Butler*, 137 Ill. App. 3d 704, 484 N.E.2d 921, 927 (1985) ("A probation revocation hearing is not a criminal adjudication").

[50] 430 U.S. at 191-192 (emphasis added). *See also Rabe* v. *Washington*, 405 U.S. 313 (1972).

Indeed, the Courts of Appeals have viewed *Bouie* broadly, as applying the Ex Post Facto Clause to judicial decisions under the rubric of due process. As one court has noted, "[a]lthough the ex post facto prohibition * * * literally applies only to legislative acts, the Supreme Court has incorporated the principle upon which the prohibition rests into the due process clause of the Fifth and Fourteenth Amendments." [51]

* * * *

Petitioner has been subjected to the ultimate professional sanction of disbarment—the loss of his livelihood—for conduct that was not clearly prohibited when it took place. The Supreme Court of Illinois was free to announce a new disciplinary rule in *Corboy*, but it was not free to apply that rule retroactively. The court itself recognized as much in not applying the new rule to the attorneys before it in *Corboy*, and yet it inexplicably applied it to petitioner. Arguably, the Supreme Court of Illinois is also free to circumscribe a lawyer's conduct with non-judicial public employees, but it cannot punish a lawyer for such conduct when the rule on which it relies, prior to its new interpretation, governed only a "judge, official, or employee of a tribunal." Finally, the Supreme Court of Illinois arguably may be free to make the "appearance of impropriety" sanctionable—barring constitutional limits of vagueness—but it cannot punish

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[51] *Knapp* v. *Cardwell*, 667 F.2d 1253, 1262 (9th Cir. 1982) (Sneed, J.). *See, e.g., Cole* v. *Young*, 817 F.2d 412, 421 (7th Cir. 1987); *Moore* v. *Wyrick*, 766 F.2d 1253, 1259 (8th Cir. 1985) (following *Bouie* in holding that the Missouri Supreme Court's move from the agency theory of felony murder to the broader proximate cause theory was "constitutionally unforeseeable" and could not be applied retroactively without impermissible ex post facto effect); *Jordan* v. *Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982) ("a state supreme court is barred by the due process clause from achieving by judicial construction a result which a state legislature could not obtain by statute").

a lawyer for such an "appearance" while at the same time admitting that the applicable Canon is not a disciplinary rule at all but merely expresses "considerations of policy."

Petitioner was subjected to all of the foregoing. The decision of the court below to apply retroactively its newly-announced rule and its unforeseeable constructions of existing rules not only were grave injustices, but also directly implicate important questions under the Ex Post Facto and Due Process Clauses. These recurring questions have not been but should be resolved by this Court.

CONCLUSION

Because of the Illinois Supreme Court's unforeseeable and unconstitutional conduct below, petitioner has had no meaningful opportunity to obtain a just resolution of his case. This Court should grant the writ and reverse the decision below to provide that oppportunity.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF ILLINOIS

Docket No. 66514—Agenda 14—September 1988

IN RE OSCAR O. D'ANGELO,
Attorney, Respondent.

OPINION

Dec. 15, 1988

JUSTICE RYAN delivered the opinion of the court:

During 1984 and 1985, Richard LeFevour, then presiding judge of the first municipal district of the circuit court of Cook County, became the subject of a Federal criminal investigation. During that period, respondent Oscar D'Angelo met with the United States Attorney concerning Avis car rentals that he had provided for LeFevour. Subsequently, respondent admitted to having provided Avis car rentals as "gifts" to several judges, including LeFevour, as well as numerous elected and appointed officials in the city of Chicago. Based on this information, the Administrator of the Attorney Registration and Disciplinary Commission (ARDC) filed a 15-count complaint against respondent, charging that he had violated Rules 1-102(a)(4), 1-102(a)(5), 7-110(a), and Canon 9 of the Illinois Code of Professional Responsibility (107 Ill. 2d Rules 1-102(a)(4), 1-102(a)(5), 7-110(a), Canon 9) and Supreme Court Rule 771 (107 Ill. 2d R. 771).

A three-member hearing panel found that respondent had engaged in professional misconduct, but disagreed as to the appropriate sanction: one member recommended disbarment, one a suspension, and one a private reprimand. The respondent filed exceptions to the hearing panel's report, but the Review Board unanimously determined that respondent's violations were egregious and recommended a two-year suspension. The Administrator petitioned for leave to file exceptions with this court, asking that respondent be disbarred. Respondent filed his exceptions to both the report and the recommendation of the Review Board.

The facts in this matter are essentially undisputed. The issues before this court are whether respondent's conduct warrants discipline and, if so, what sanction is appropriate.

Respondent was admitted to practice law in Illinois in 1959. After spending a number of years with other law offices, he joined the firm of Friedman and Koven as a partner in 1973 or 1974. Due to the recent dissolution of Friedman and Koven, respondent is currently a partner with the firm of Altheimer and Gray.

During his tenure with Friedman and Koven, respondent concentrated his practice primarily in commercial real estate, municipal law, and public financing. In addition, respondent and other members of his family were actively purchasing and developing various real estate properties in the city of Chicago. Respondent was also involved with several community and public interest groups concerned about blight and neighborhood preservation, donating many hours of *pro bono* work to these organizations. Although respondent rarely served as a trial attorney during his association with Friedman and Koven, other lawyers from the firm regularly represented clients before the circuit court of Cook County.

When respondent joined Friedman and Koven, he brought with him as clients the University of Chicago, Rush-Presbyterian-St. Luke's Hospital, and Avis Rent-A-Car Systems, Inc. (Avis). Avis had been respondent's client for quite some time, and through Avis, respondent began a practice of reserving rental cars for family friends, judges of the Cook County circuit court, and public officials of the city of Chicago. The requests for car rentals increased after respondent joined Friedman and Koven, and problems arose with the *ad hoc* system that was used to reserve automobiles. In an effort to remedy this situation, respondent met with officials from Avis, and received authorization from them to issue Avis Company Travel Orders (ACTO). An ACTO enabled the recipient to receive a specific automobile and ensured that the particular car chosen would be waiting at a given location at the appointed time. An ACTO also made Friedman and Koven the guarantor of payment for the rental should the recipient fail to pay. Typically, the recipient of the ACTO woud not pay for the rental, and Avis would then look to Friedman and Koven for payment. Friedman and Koven would satisfy Avis' bill and then debit respondent's personal firm account. Respondent rarely asked the ACTO recipient to reimburse him for the rentals. Consequently, respondent provided rental cars free of charge to numerous public officials and judges.

One of the judges who received free rental cars was Cook County Circuit Judge Richard LeFevour. At the time he received the rentals, LeFevour was presiding over extensive litigation between the city of Chicago and several automobile rental companies, including Avis. Respondent represented Avis in this case. The city had sued Avis and the others over liability for unpaid parking tickets which had been left upon illegally parked rental cars. The case eventually reached this court (*City of Chicago v. Hertz Commercial Leasing Corp.* (1978), 71

Ill. 2d 333), which ruled in favor of the city, holding Avis liable for the tickets. After an unsuccessful petition for writ of *certiorari* to the United States Supreme Court (*Avis Rent-A-Car Systems, Inc. v. City of Chicago* (1978), 439 U.S. 929, 58 L. Ed. 2d 322, 99 S. Ct. 315), the case returned to the circuit court of Cook County and was assigned to LeFevour.

Numerous pretrial conferences were held between the parties, some of which took place in LeFevour's chambers. In November 1981, after several unsuccessful attempts to reach a compromise, the city moved to go to trial. Avis countered with a motion to dismiss. LeFevour told both parties that he would be out of town for a few weeks, but would rule on both motions in the very near future. LeFevour, however, had never ruled on either motion when he left the bench in mid-1984.

Between April 1982 and May 1984, LeFevour obtained rental car reservations from respondent on six different occasions. Although at one point respondent questioned LeFevour regarding payment for the rentals, respondent paid for all of the charges, totalling over $2,500. At no time did respondent take any formal steps to collect from LeFevour for these rentals, nor did he inform opposing counsel in the parking ticket litigation that he was providing rentals for LeFevour. Respondent never sought a substitution of judge.

In addition to LeFevour, respondent also arranged and paid for several car rentals for Cook County Circuit Judge James Murphy. Like LeFevour, Murphy never paid for any of the rentals; instead, respondent took care of the bills, which totalled over $1,000. Murphy presided over matters involving some of respondent's clients including Avis. Also, Murphy was regularly contacted by Friedman and Koven employees regarding jury summonses that the firm's clients received. A note to respondent from his secretary concerning one of Murphy's rental invoices read as follows:

"Mr. D'Angelo:

Just a remainder—This bill is for Judge James Murphy—the judge who takes care of our numerous jury summonses for Maybrook and California."

In 1984, respondent secured a car reservation for Cook County Circuit Judge Richard Jorzak. Although the judge testified before the ARDC hearing panel that he was unaware that respondent had paid for the rental, Friedman and Koven records show that the firm had debited respondent's personal account for $458.93 as payment for Judge Jorzak's Avis invoice. Sometime prior to receiving the rental, Judge Jorzak had dismissed a case that the city had brought against respondent concerning a code violation in one of respondent's properties.

Former judge John Hechinger, who was presiding judge of the chancery division of the circuit court of Cook county, obtained three Avis rentals through respondent. During the time these rentals were effected, Friedman and Koven attorneys would appear before Judge Hechinger. Although the judge claims to have repaid respondent, he offered no documentation substantiating any reimbursement.

At least two other Cook County judges received car rentals from respondent. Former circuit judge Allen Rosin rented Avis automobiles through respondent, and one rental, in the sum of $418.42, was paid by respondent. Respondent also paid for an Avis rental of approximately $200 for his longtime friend, Circuit Judge Frank Siracusa.

Finally, having regular contact with numerous elected and appointed officials of the city of Chicago (partially because of his real estate holdings, and partially because of the nature of his law practice), respondent, during the years 1980-84, provided Avis car rentals to the following:

Richard J. Brzeczek—Superintendent of Police;

Gilbert J. Cataldo—commissioner, Department of Housing;

William L. Duggan—commissioner, Department of Housing;

Anthony N. Fratto—comptroller, Department of Budget;

Edwin A. Gausselin—first deputy corporation counsel, Department of Law;

Thomas Kapsalis—commissioner, Department of Aviation;

John W. McCaffrey—chief assistant corporation counsel, Revenue Division, Department of Law;

Herman Moses—director of licensing, Department of Inspectional Services;

Martin Murphy—chairman of the Commission on Urban Renewal;

Timothy D. O'Hara—chief assistant corporation counsel, Torts Division, Department of Law;

Eugene Ray—alderman, city of Chicago;

Miguel A. Santiago—alderman and chairman of the housing committee, city of Chicago;

David F. Schultz—budget director, Office of Budget and Management;

Henry F. Weber—assistant corporation counsel, Department of Law.

The value of these rentals was more than $8,000. Respondent paid for many of these rentals.

Friedman and Koven's executive committee decided to halt the practice of issuing Avis Company Travel Orders to judges and public officials. This occurred in 1985 when the payment of car rentals for Richard LeFevour appeared in the newspapers in conjunction with LeFevour's

criminal prosecution. The resulting adverse publicity for the firm put an end to respondent's car rental activities.

In examining these activities, the Review Board of the ARDC found that the grave nature of respondent's coinduct warranted a two-year suspension from the practice of law. While we give the Board's recommendations due deference, we note that final responsibility for determining the appropriate sanction in attorney disciplinary cases rests with this court. (*In re Harris* (1982), 93 Ill. 2d 285, 291-92; *In re Hopper* (1981), 85 Ill. 2d 318, 323-24.) Each disciplinary case is unique and must be evaluated based on the particular set of facts presented. (*In re Leonard* (1976), 64 Ill. 2d 398, 404; *In re O'Hallaren* (1976), 64 Ill. 2d 426, 433.) The purpose of discipline is not to punish the attorney, but to protect the public and to maintain the integrity of the judicial system. *In re Pappas* (1982), 92 Ill. 2d 243, 247; *In re Neff* (1980), 83 Ill. 20, 25.

The integrity of the judicial system is at the heart of the most serious charge against the respondent, and the one upon which the other subsidiary charges stand. By arranging and paying for rental cars for several judges, respondent was found to have violated Disciplinary Rule 7-110(a), which, as amended in *In re Corboy* (1988), 124 Ill. 2d 29, states:

> "(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office." *In re Corboy*, 124 Ill. 2d at 46.

In *re Corboy*, we added the language in Rule 7-110(a) which refers to Rule 65(C)(4) of the Code of Judicial Conduct. Thus, in addition to contributing to a judge's

campaign fund, a lawyer may also give or lend something of value to a judge which the judge is permitted to accept under Rule 65(C)(4). Rule 65(C)(4) states:

> "(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:
>
> (a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
>
> (b) a judge or a member of his family residing in his household may accept *ordinary social hospitality*; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;
>
> (c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan *only if the donor is not a party or other person whose interests have come or are likely to come before him*, including lawyers who practice or have practiced before the judge." (Emphasis added.) 107 Ill. 2d R. 65(C)(4).

Subsection (a) of this rule is obviously inapposite. Whether subsection (b) applies turns on whether the providing of rental cars to judges is "ordinary social hospitality." In *In re Corboy* we said:

> " 'Ordinary social hospitality' is not a self-defining concept. It is not, however, completely opaque. We

> believe that ordinary social hospitality consists of those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer. The test is objective, rather than subjective, and the touchstone is a careful consideration of social custom. While we cannot draw any bright lines, we believe that the following factors should be taken into account: (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor/lender lawyer, (3) the social practices and customs associated with gifts and loans, and (4) the particular circumstances surrounding the gifts and loans." (*In re Corboy*, 124 Ill. 2d at 42-43.

Viewing respondent's gifts to the judges in this case, it is clear that car rentals worth hundreds or thousands of dollars could not, under any circumstances, be "ordinary social hospitality" within the purview of Rule 65(C)(4)(b).

Finally, we hold that these car rentals are not permissible under subsection (c) of Rule 65(C)(4), because we find that respondent and other Friendman and Koven attorneys had interests which were before or likely to come before the judges in question. Respondent represented Avis in extensive litigation before Judge LeFevour at the time he supplied Avis rentals to the judge. Similarly, Friedman and Koven's diverse practice required its attorneys to appear before numerous members of the Cook County judiciary. As a partner in Friedman and Koven, respondent stood to gain from these appearances by his firm's employees, and therefore had an interest, albeit an indirect one, before these judges. Moreover, it cannot be argued that these car rentals were permissible gifts simply because respondent did not appear personally before some of the judges in question. "It is * * * not proper to rationalize a judicial gift to a judge

who may sit in probate or traffic * * * simply because the donor only tries cases in another division of the court. Under our rules, a judge is not a permanent fixture of any division, but is subject to reassignment * * *." *In re Corboy*, 124 Ill. 2d at 44.

Having determined that respondent's "gifts" to these judges were not permissible under any of the exceptions provided by Rules 7-110(a) and 65(C)(4), we find that respondent violated Rule 7-110(a). We further find that by these actions respondent has violated Rule 1-102(a)(4) (engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 1-102(a)(5) (engaged in conduct that is prejudicial to the administration of justice) of the Illinois Code of Professional Responsibility (107 Ill. 2d Rules 1-102(a)(4), (a)(5)). Finally, respondent also contravened our Supreme Court Rule 771, because his activities brought the court and the legal profession into disrepute. 107 Ill. 2d R. 771.

Respondent's behavior involving the judges also violated Canon 9 of the Illinois Code of Professional Responsibility, which states, "A lawyer should avoid even the appearance of professional impropriety" (107 Ill. 2d Canon 9). In *In re Powell* (December 15, 1988), No. 65387, the propriety of a charge of the general violation of Canon 9 was raised. In *Powell*, this court stated:

> "We believe that Canon 9 is not a standard of discipline in itself but expressed the policy considerations underlying the disciplinary rules contained within Canon 9. While respondent's conduct was not only improper but also created the appearance of impropriety, we nevertheless conclude that Canon 9 does not afford a basis for imposing sanctions independent of an allegations and proof of a violation of one of the disciplinary rules contained within the canon." (*In re Powell* (December 15, 1988), No. 65387, slip op. at 9.)

Nevertheless, by fashioning himself a travel agent for judges and at least 14 elected or appointed officials of the city of Chicago, respondent gave the impression of one trying to influence decisionmakers in all areas of city and county government. While some may view "clout" as an acceptable means of doing business, we will not condone or tolerate this type of activity. Attorneys are officers of the court. (*In re Zisook* (1981), 88 Ill. 2d 321, 331.) As such, an attorney's professional conduct must be above reproach.

The only remaining issue, therefore, is what sanction is appropriate in this case. The nature and severity of a sanction imposed for a violation of Rule 7—110(a) depends on the intent and motive of the attorney being disciplined. (*In re Ketchum* (1988), 124 Ill. 2d 50, 57-58.) Intent and motive are rarely revealed in direct testimony, but rather must be inferred from conduct and surrounding circumstances. (*In re Schwartz* (1972), 51 Ill. 2d 334, 336.) In the case before us, it is obvious from respondent's conduct that his intent was to curry favor for himself and his firm not only from several judges, but from various Chicago officials as well. The facts in this case do not set forth isolated instances of misconduct; respondent's behavior was long-standing, continuous, and widespread. Respondent on behalf of judges and public officials, paid more than $10,000 for over a decade's worth of rental charges. Furthermore, the pattern of malfeasance here demonstrates that respondent chose the recipients of his generosity carefully to coincide with the needs of his and his firm's practice. The record before this court leaves no room for doubt as to the seriousness of respondent's actions.

We note that respondent's conduct here is similar to that found in *In re Ketchum* (1988), 124 Ill. 2d 50. In that case, Walter Ketchum, an attorney, loaned a total of $9,300 over several years to Judge Richard LeFevour. Although there was no direct proof that LeFevour had

advanced Ketchum's interests in any way, the clear evidence of impropriety led this court to suspend Ketchum for two years. Unlike Ketchum, however, respondent in this case was not content to focus his attention on one judge; instead, he sought favor with no fewer than 6 judges and 14 public officials. Consequently, we view respondent's transgressions as much more egregious than that shown in *In re Ketchum.*

Respondent contends that the ABA Standards for Imposing Lawyer Sanctions (1986) (ABA Standards), cited with approval by this court in *In re Cheronis* (1986), 114 Ill. 2d 527, suggest only censure or private reprimand as the appropriate discipline for his conduct. While not passing on the persuasiveness of the ABA Standards in this jurisdiction, we find that the sections cited us by the respondent do not accurately define the misconduct respondent engaged in. Indeed, we find nothing in the ABA Standards that is helpful or instructive in this case.

Respondent further contends that his history of extensive public service and *pro bono* work should serve to mitigate his conduct. While we are not unmindful of respondent's reputation in the community, we do not see how this could in any way offset his failings. On the contrary, we feel that respondent's misconduct merits a more severe sanction than the suspension recommended by the Review Board. Accordingly, respondent is disbarred from the practice of law.

Respondent disbarred.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

January 30, 1989

Mr. Jeff Kraus
Altheimer & Gray
10 S. Wacker Dr., S#3600
Chicago, IL 60606

No. 66514—In re: Oscar O. D'Angelo. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Calvo, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 9, 1989.

APPENDIX C

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 86 CH 211

IN THE MATTER OF OSCAR O. D'ANGELO,
Attorney-Respondent,
No. 576646

REPORT AND RECOMMENDATION

[Filed Nov. 13, 1987]

This matter comes before the Review Board upon three separate reports of the Hearing Board recommending Respondent be disciplined. The reports recommended (1) the imposition of a private reprimand; (2) suspension from the practice of law for one year; and (3) disbarment. This Board has the responsibility to determine whether discipline is to be recommended to the Court, and, if so, which sanction is appropriate taking into consideration all matters pertinent to Respondent's conduct.

In 1973-1974, Respondent joined as a partner the firm of Friedman and Koven and bringing with him as clients Avis Rent-A-Car Systems Inc. (whom he has represented for approximately 13 years), the University of Chicago, and Rush-Presbyterian-St. Luke's Hospital, all of whom he represented as a partner of Pfeiffer and D'Angelo, his previous association. The firm practiced in many

substantive areas of law including litigation, probate, real estate, municipal law, public financing, corporation and commercial law. Friedman and Koven attorneys appeared on behalf of clients in the Circuit Court of Cook County. In addition, lawyers with the firm represented governmental agencies in the issuance of municipal bonds, appeared in the Board of Tax Appeals, and worked on zoning cases within the Chicago area. During his tenure at the firm, Respondent concentrated his practice in the area of municipal and public financing and had regular dealings with public officials of the City of Chicago.

Respondent is currently a partner in the firm of Altheimer and Gray due to the dissolution of Friedman and Koven. Respondent remains active in the practice of municipal law and public financing. Throughout his association with Friedman and Koven Respondent, with members of his family, was active in commercial real estate development in Chicago, and at the present time he represents clients in very substantial real estate development in the City.

For a number of years, Respondent had provided Avis rental automobiles to many including family friends, judges of the Circuit Court of Cook County, and public officials of the City of Chicago. This practice of accommodating rentals began when Respondent was still associated with Pfeiffer and D'Angelo. Such a service was important to the beneficiary, for that individual could obtain a specific automobile for a popular location at a popular time of year.

After Respondent began working at Friedman and Koven, there was an increase in the number of people seeking Avis automobiles through him. At that time, Respondent discovered that problems had developed with the process of accommodating rentals and that people were not receiving the automobiles they wanted. As a result, Respondent met with an Avis official in 1976 in

order to develop a system to ensure that rental cars would be available when so desired. Within a few weeks of the meeting, Respondent was authorized to issue Avis Company Travel Orders (ACTO).

ACTO were issued by Avis to select people and businesses and were used to reserve an Avis rental car of desired specifications, confirm credit arrangements and, on occasion, provide a discount to the user. ACTO also served as a one time credit card with payment guaranteed by the firm of Friedman and Koven. Holders of the ACTO received V.I.P. treatment from the company.

As a matter of common practice, when an individual desired the use of a rental car, that person would contact Respondent or Respondent's secretary. On occasion, Respondent would make unsolicited offers of rental automobiles to judges and political officials. Thereafter, Respondent or his secretary would authorize the issuance of an ACTO to the individual. Arrangements would then be made with Avis by Respondent's support staff so that the appropriate rental car would be available. The individual who had received the ACTO would present it at a designated Avis travel counter at the time of rental and obtain the car. As a general rule, after the rental car was returned, Avis would forward an invoice to the name and address of the customer provided. If the lessee did not pay within a reasonable time, Avis would request that Friendman and Koven pay the obligation as guarantor.

During 1967, while Respondent was with the firm of Pfeiffer and D'Angelo, the City of chicago filed suit against Avis and two other automobile rental companies in the Circuit Court of cook County. The City sought to recover the payment of fines from Avis and the other defendants as registered owners of vehicles allegedly parked in violation of municipal ordinances. The City also sought a declaratory judgment finding that the

rental car owners, rather than the individual customer-lessees, were responsible for the parking violations. Respondent brought this case with him to Friedman and **Koven.**

On April 4, 1972, the Circuit Court ruled in favor of Avis and the other defendants holding that they were not responsible for tickets issued when rental vehicles were in possession of the customer lessees. On April 26, 1976, the Appellate Court reversed and remanded the case with directions. The Supreme Court of Illinois affirmed the judgment of the Appellate Court on April 3, 1978. After an unsuccessful petition for writ of certiorari to the United States Supreme Court, the case was returned to the Circuit Court of Cook County in 1979. Circuit Judge Richard F. LeFevour, then Chief Judge of the Traffic Division of the First Municipal District, was assigned the case.

Between 1979 and 1981, there were numerous pretrial conferences in the remanded case. During that time, Respondent represented Avis in court and attended many pretrial conferences in Judge LeFevour's chembers. Originally, the parties had hoped for a settlement of the litigation. Because of the lack of success in achieving a settlement, attorneys for the City filed a motion before LeFevour seeking to go to trial. In doing so, the City wanted to be heard on the merits of the action, although as, a matter of strategy it was hoped that such a pleading would result in a negotiated settlement.

In mid-1981, Avis and the other defendants filed motions to dismiss the litigation by challenging the validity of the original service of process because parking tickets had been left on parked rental cars. On November 3, 1981, oral argument on the motions was conducted before LeFevour. At that time, LeFevour informed the parties that he would be out of town for several weeks but would make a ruling on the motions soon.

During the summer of 1984, Judge LeFevour took a leave of absence from his duties as a Circuit Court Judge. As of that time, the litigation was still pending. LeFevour never ruled on the motions challenging the validity of service of process.

Because of the pendency of the case before LeFevour, the City was not involved in uniform aggressive enforcement of the municipal parking ordinances. Some automobile rental agencies benefited from the lack of a judicial decision and did not pay parking tickets during this period. Further, because no decision was rendered, defendants did not pay the subject parking finds assessed for the years 1966 through 1981.

At the hearing, Respondent testified that the parking ticket case was an important one for the client and that the magnitude of the litigation "proliferated the office". The City of Chicago also viewed the outcome of the case as important.

In early 1982, Judge LeFevour contacted Respondent. LeFevour informed Respondent that he was going out of town and was having difficulty in obtaining a rental car for use in Phoenix, Arizona. Respondent agreed to help the judge. At the time of their conversation, Respondent was aware that LeFevour was presiding over the parking litigation.

Beginning in April 1982, LeFevour received an ACTO on six different occasions from Respondent's office. In each instance, the judge used an Avis automobile but did not pay for it. Instead, Friedman and Koven paid for his automobiles and debited Respondent's personal account at the firm for the appropriate amount. At no time did LeFevour ever reimburse Respondent for the rentals.

Respondent asserted at hearing that he became aware of LeFevour's failure to pay his rental obligations sometime after the third or fourth rental. He then instructed

his secretary to send Avis invoices to the judge, which she did.

Subsequently, LeFevour called Respondent and asked for another automobile. LeFevour told Respondent to trust him and that the outstanding rental obligations would be paid. Respondent agreed to make another rental for the judge. Sometime in March 1983, LeFevour apparently returned copies of the unpaid Avis invoices to Respondent.

Respondent never took any formal action to collect LeFevour's outstanding obligation. At no time did Respondent inform any of the parties to the parking ticket case that he had paid for car rentals for the presiding judge. Further, Respondent never sought a change of venue from LeFevour in the case.

During 1984 and 1985, Richard LeFevour became the subject of a federal criminal investigation. Sometime during that period, Respondent met with the United States Attorney concerning LeFevour. At the subsequent trial of the judge, the government introduced into evidence an exhibit reflecting that the firm of Friedman and Koven had paid for the rentals of Avis automobiles. The payment by Friedman and Koven was reported in the newspapers and resulted in adverse publicity for the firm. As a result of the adverse publicity, the practice of issuing ACTO stopped. The decision to cease the activity was made by the firm's Executive Committee.

Respondent personally approved payment for rental cars on behalf of other Circuit Court of Cook County judges and public officials.

Respondent paid for four different rentals for Circuit Court of Cook County Judge James E. Murphy over a five year period. Between 1968 and 1971, Murphy heard cases in the Housing Court of the First Municipal District. Since 1975, he has heard cases in the Law Division. Although the judge stated at the hearing that he did

not hear cases in which Friedman and Koven attorneys or Respondent appeared, he did preside over matters involving Respondent's clients such as Avis and Rush-Presbyterian-St. Luke's.

During the time Judge John F. Hechinger was assigned to the Chancery Division of the Circuit Court of Cook County between 1976 and 1986, attorneys affiliated with Friedman and Koven appeared before him. The judge received three different Avis rentals through Respondent's office. Each bill was paid by someone other than the judge.

Respondent and former Circuit Court of Cook County Judge Allen F. Rosin played handball together as members of the Riviera Club, Chicago. Several Avis rentals were obtained for Judge Rosin and members of the judge's family. Friedman and Koven paid a $418.42 rental on behalf of the judge and debited Respondent's account at the firm for the appropriate amount.

Circuit Court of Cook County Judge Richard H. Jorzak was Presiding Judge of the Housing Division of the First Municipal District from 1976 through 1981. During that time, the judge entered an order dismissing a case brought by the City of Chicago against Respondent and his brother relating to property both owned on the Near West Side. On or about January 18, 1984, a $458.93 invoice incurred by the judge for an Avis rental was paid by Friedman and Koven and debited to Respondent's account at the firm. At the hearing, the judge tesitfied that he was unaware that the care had been paid for by Respondent.

Circuit Court of Cook County Judge Frank Siracusa, a longtime friend of Respondent, had a $208.63 Avis invoice paid for him by Respondent during 1983.

Finally from 1980 through 1984, ACTO were provided to the following elected or appointed officials of the City of Chicago:

1. Richard J. Brzeczek, Superintendent of Police.
2. Gilbert J. Cataldo, Commissioner, Department of Housing.
3. William L. Duggan, Commissioner, Department of Inspectional Services.
4. Anthony N. Fratto, Comptroller, Department of Budget.
5. Edwin A. Gausselin, First Deputy Corporation Counsel, Department of Law.
6. Thomas Kapsalis, Commissioner, Department of Aviation.
7. John W. McCaffrey, Chief Assistant Corporation Counsel, Revenue Division.
8. Herman Moses, Director of Licensing, Department of Inspectional Services.
9. Martin Murphy, Chairman of the Commission of Urban Renewal.
10. Timothy D. O'Hara, Chief Assistant Corporation Counsel, Torts Division, Department of Law.
11. Eugene Ray, Alderman, City of Chicago.
12. Miguel A. Santiago, Alderman and Chairman of the Housing Committee, City of Chicago.
13. David F. Schultz, Budget Director, Office of Budget and Management.
14. Henry F. Weber, Assistant Corporation Counsel, Department of Law.

We find that the Administrator has clearly and convincingly proven the allegations of the complaint, and we adopt both the findings of fact and conclusions of fact and law as set forth in the Hearing Board Reports of Members Popejoy and Beckman, respectively, which are

appended hereto. By reason of his conduct which has been clearly and convincingly proven, we find Respondent has:

1. Violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in actions prejudicial to the administration of justice;

2. Violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

3. Violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation;

4. Failed to avoid even the appearance of an impropriety in violation of Canon Nine of the Illinois Code of Professional Responsibility; and

5. Violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

We disagree with the Hearing Board Chair's singling out Cook County as an appropriate forum for the conduct of the Respondent's activities in the context of the time in which they occurred. (Hearing Board Report, S. Kerrick, pp. 13-14) The ethical standards the Respondent stands accused of violating existed when the acts were committed as they do at the present time. Greylord, at best, focused attention upon the various participants and their deeds, but the ethical standards, concepts and practices, for the vast majority of practitioners who abide by them, remain unchanged, Greylord notwithstanding. What Respondent did was wrong then and is wrong now.

We are not unmindful of Respondent's reputation in both the legal and general communities, his prior unblemished record, his acts of charity nor the many prominent personages attesting to his truthfulness and in-

tegrity. However, we are of the opinion that an attorney with the unquestioned standing in the community and the profession, such as the Respondent, will be required to answer for a violation of his duties as set forth in the Code of Professional Responsibility which are clearly and convincingly proved.

Many provisions of the Illinois Code of Professional Responsibility, and more particularly Rule 7-110(a), are designed to preserve and protect the integrity of our judicial system, and to preserve an independent and impartial judiciary. Dependence of judges upon favors of lawyers, be it financial or other tangibles having value, destroys the goal of an independent and impartial judiciary. The practice of lawyers giving items of value to judges erodes and destroys the confidence of the public in the bar, the judiciary and the entire legal system. All parties have an absolute right to appear before a tribunal wihch is above reproach and free from even the appearance of being less than impartial. Respondent's conduct absolutely compromised those values which are to be cherished and jealously protected. This simply can no longer be countenanced by our profession which must look to the Court in its stewardship, if the profession as we know it, is to survive. Respondent's practices were most egregious and substantial discipline is warranted.

We unanimously recommend to the Court that the Respondent be suspended from the practice of law for a period of two years.

Respectfully submitted,

CHESTER L. BLAIR, Chairman
HERBERT J. BELL
MICHEL A. COCCIA
C. WILLIAM FECHTIG
WATTS C. JOHNSON
JOHN CADWALADER MENK
MARTIN L. SILVERMAN
MARSHALL A. SUSLER

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 86 CH 211

IN THE MATTER OF: OSCAR O. D'ANGELO,
Attorney-Respondent,

No. 576646

PROOF OF SERVICE
OF THE REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

I, Kenneth G. Jablonski, on oath state that I served a copy of the Report and Recommendation of the Review Board on the parties listed at the addresses shown below, by depositing it with proper postage prepaid in the U.S. Mailbox located at 203 North Wabash Avenue, Chicago, Illinois on November 16, 1987 at or before 5:00 p.m. At the same time copies were mailed to the members of the Hearing Panel, Review Board and deliver to Counsel for Administrator.

Phillip W. Tone
William D. Heinz
Sophia R. Papandreas
Counsel for Respondent
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Attorney-Respondent
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/s/ Kenneth G. Jablonski
KENNETH G. JABLONSKI
Clerk

Subscribed and sworn to before
me this 16th day of November, 1987.

/s/ Florence Eva Framutolo
Notary Public

APPENDIX D

BEFORE THE HEARING BOARD OF THE
ILLINOIS ATTORNEY REGISTRATION AND
DISCIPLINARY COMMISSION

Administrator's No. 35 CH 211

IN THE MATTER OF: OSCAR O. D'ANGELO,
Attorney-Respondent,
No. 576646.

OPINION OF THE CHAIR

[Filed Apr. 30, 1987]

The Complaint against Oscar O. D'Angelo came on for hearing for two full days of trial on January 28, 1987, and February 23, 1987, before members of the hearing Board. Charley Popejoy, Charles Beckman, and Sandra Kerrick, who chaired the hearing.

The Administrator was represented by James Grogan and Naomi Woloshin. The Respondent was personally present and was represented by counsel, Jenner & Block, Philip W. Tone, William D. Heinz and Sophia R. Papandreas.

Respondent is attorney for Avis Rent-a-Car. Avis allowed Respondent to issue vouchers to various of his friends and associates for priority reservations to obtain a rent-a-car. If the person to whom the car was rented ultimately failed to pay the rent-a-car bill, Respondent's law firm, Friedman & Koven would pay the bill and charge the expense to Respondent. The effect was that Respondent did pay for the Avis bills.

The Complaint charged the Respondent with issuing Avis vouchers for priority reservations to six Cook County judges and fourteen non-judicial public officials. Friedman & Koven paid Avis bills in excess of $5,000.00 for the collective bills of the six judges and charged D'Angelo's partnership draw. The Complaint does not charge that any bills were paid for the fourteen other public officials, or the amounts involved, but the record shows some of those bills were paid by Friedman & Koven. The Complaint also charges that at the time invoices were paid for Judge LeFevour, the Respondent was handling litigation for Avis before LeFevour. No action was ever taken by LeFevour thereafter.

The Complaint is more notable for what it fails to allege. The Complaint does not allege that Respondent knew of the specific payments nor approved of the payments. The Complaint does not allege that Respondent knew for whom Friedman & Koven had paid Avis bills. The Complaint does not allege Respondent intended to pay the Avis bills. The Complaint does not allege that Respondent sought or received any benefit (in the nature of the bride) from being personally charged for the rental bills, and no such proofs were offered. The Complaint does not allege a single factual statement of any damage perpetrated by Respondent, and no such proofs were offered.

The Administrator has relied solely on the payments to argue that the payments, in themselves, evidence extreme moral culpability, and that the Respondent must be disbarred. I believe that the quantum of proof needed to sustain a finding of extreme moral culpability to warrant disbarment or suspension is not present in the record. Nor are there any proofs in the record which could lead one to the conclusion that in engaging in this activity, Respondent acted with extreme moral culpability. We cannot impose disbarment based on mere disbarment based on mere supposition or innuendo for

what might have been. There must be clear and convincing evidence to sustain the discipline to be imposed.

There was proof that Avis vouchers for priority reservations were widely distributed among 150 people, and that Respondent did pay some of those bills. Not only was the matter admitted, but those facts, themselves, except for the LeFevour incident, were brought by the Respondent to the Administrator because he saw fit to cooperate with the investgiator. His own law firm had perceived no impropriety in the matter, and when the Administrator requested an explanaiton of the LeFevour problem, Respondent disclosed the entire priority reservation system and how it had been used and for whom over the last 15 years. Further, as soon as there was a suggestion that the system was improper, the voucher system was completely terminated. Respondent testified that he would not resume the practice again.

One reading of the Complaint against Respondent would lead the reader to infer that Respondent was engaged in some sort of wide-spread bribery or kick-back scheme camouflaged as a rent-a-car voucher. No such evidence of bribery was presented by the Administrator. No evidence was presented that Respondent received any benefit from any of the 150 people who received vouchers. If they were intended as bribes, certainly evidence should have been abundant, but not one piece of evidence of *quid pro quo* was produced. The activity was much less contrived than one would assume from reading the allegations.

In fact, with the exception of Judge LeFevour, there was no evidence that Respondent or his firm had litigation pending before the named judges who received the vouchers. Respondent did prove that he had had a personal, cordial relationship with the judges receiving the vouchers, in some cases since high school and law school. Respondent proved that hundreds of Avis vouchers were

made available ot approximately 150 people over a fifteen year period—not only to Respondent's friends, but also to friends and relatives of the other lawyers at Friedman and Koven. Whoever requested one was given one. Many or most of the requests, including those of the judges, were not even made to Respondent, but were made to a series of secretaries.

Three secretaries gave highly credible testimony that each had worked for D'Angelo over a period of years. D'Angelo never paid any attention to the matter. The secretaries never had time to deal with the matter. They had difficulty keeping track of vouchers issue. One secretary testified she was so disgusted with the perpetual mess she threw the file on a shelf and refused to deal with it. There was considerable evidence that there was massive confusion in the way Avis handled the matter, and Respondent's secretaries were never sure which of several methods was being applied. Sometimes Avis would send a bill to the customer. Sometimes a bill would be mailed to Friedman and Koven, and sometimes both would receive the same bill. Some bills were paid twice; some not at all. D'Angelo never paid attention to the confusion.

From time to time, long after a voucher had been outstanding, Friedman and Koven would receive notice that a particular customer had not paid. Friedman and Koven would start sending collection letters to the customer. If the customer did not pay, ultimately Friedman and Koven would pay the bill, and then the firm would charge D'Angelo's personal draw with the expense. There was no question Friedman and Koven was attempting to collect the money for the bills.

The secretaries testified that on an approximately annual basis D'Angelo would receive a ledger from the firm with a total dollar amount (but no names) of his Avis expense. Invariably, D'Angelo would tell the secretary that the number could not possibly be right, and

somebody better go straighten it out. He thought the firm was charging him with miscellaneous vouchers that nobody else claimed.

The vouchers were provided to judges and various other public officials, usually at their own request.

For example, Judge Murphy's son was getting married in an out-of-the-way location where his parents would use a minor airport where they could not book a rent-a-car. Judge Murphy was aware from conversations with city corporate counsel that D'Angelo's client, Avis, allowed him to distribute priority reservation vouncher s. Murphy could not get a car and called D'Angelo for assistance. D'Angelo's secretary issued the voucher.

At some later date Murphy discussed the bill with D'Angelo, and D'Angelo told him to consider it a wedding gift for his son. The record show that D'Angelo and Murphy did have the kind of relationship that would justify a wedding gift. They had socialized together for years and D'Angslo had attended a party in the judge's house when he built a new recreation room. Murphy testified that he did not seek vouchers from D'Angelo except when he had difficulty such as when he had trouble renting a car in Ireland.

Judge Hechinger's bills were confused. He and D'Angelo both thought Hechinger had paid the bill. To this day, there is still confusion on the point because billings were being mailed in duplicate and may have been paid by both parties. The judge's American Express bills indicated he paid several rent-a-car bills, but they were apparently for other cars where he did not use D'Angelo's vouchers. Hechinger testified that he thought he had paid the bills because of the number of charges on his credit card. D'Angelo testified that he also thought Hechinger had paid for them. However, Friedman and Koven paid the bill and charged it to D'Angelo.

Judge Jorzak's story was equally unconvincing that any grand bribery scheme was in effect. D'Angelo and Jorzak had been personal friends since law school. D'Angelo had a conversation with Jorzak when they literally ran into each other at a Delta ticket office. Jorzak was going on a trip to Florida in a few days. D'Angelo told Jorzak that his secretary should issue Jorzak a voucher so he could be sure to get a car. When Judge and Mrs. Jorzak arrived in Florida, they rented the car and used the Judge's credit car to check out the vehicle. Within a day the Judge was called home because of the illness of a relative. His wife completed the vacation alone and returned the car at the end of her vacation. The judge assumed his wife had charged the bill with her own credit card. He did not know until this investigation that neither he nor his wife ever received a bill. He testified that he expected to pay the bill and only thought the voucher was a preferred reservation.

William Duggan, an investigator for the city Finance Committee, testified that he expected to pay for his rent-a-car bill. When the Avis bill arrived it was for $80-$100 a day. Duggan thought the bill was in error because of the high price. He called D'Angelo's office to determine whether the bill was correct. Someone at the office instructed him to mail it to D'Angelo's office so they could check it out. Until this investigation, Duggan neved did know what happened to the bill. It was ultimately paid by Friedman and Koven and charged to D'Angelo.

I have recited these examples from the record because, collectively, I believe they belie the Administrator's claim that he has proved a bribery scheme or extreme moral culpability vis-a-vis D'Angelo and the officials involved in the rent-a-car activities.

D'Angelo himself, testified that with a few exceptions, like the wedding gift for the Murphy family, he expected

the voucher recipients to pay for the cars rented. The correspondence in the file and the testimony of the secretaries corroborated this fact. For this reason, by itself, I believe the Administrator has failed in its burden of proof in showing extreme moral culpability in undermining justice. There is also no evidence that D'Angelo knew, until this investigation, just which bills he had paid, for whom, or for what amounts. It is interesting to note the Administrator never argued that D'Angelo even knew he was making all of these payments (other than specifics like Murphy). His secretary testified categorically that she did not know and D'Angelo did not know and could not figure out who owed what. I respectfully suggest we cannot suspend or disbar a person for activities he did not know about.

There were, however, two particularly bothersome aspects of this case.

The first was D'Angelo's problem with Judge LeFevour. It should be noted for the record that the Administrator relies solely on the payments themselves, but did not call Judge LeFevour to testify as to the circumstances. Thus we are left only with D'Angelo's testimony of what occurred which was fully corroborated by his secretaries who remembered the problem of the LeFevour non-payment and D'Angelo's collection attempts. The Administrator was not able to impeach either their testimony or D'Angelo's on what they recall of the LeFevour transcation. Contrary to hearsay objections by the Administrator, D'Angelo could properly testify to his own state of mind and the activities he engaged in in his efforts to collect the money from LeFevour. I believe the Administrator failed in its burden of proof on the LeFevour matter to prove extreme culpability.

However, the matter does involve an element of impropriety. LeFevour called Respondent and told him he was having difficulty renting a car. D'Angelo told him

he would provide a voucher. During that period D'Angelo was handling litigation involving hundreds of thousands of Avis parking tickets which was pending before LeFevour. LeFevour had heard arguments on dismissing the case and had taken the matter under advisement. Subsequently, LeFevour secured two or three more vouchers through the secretary. There is no proof D'Angelo knew of the subsequent vouchers. At still later date, one of the secretaries realized Friedman and Koven was receiving delinquent bills on the LeFevour account. She told D'Angelo and D'Angelo wrote a letter demanding payment. In response, LeFevour wrote a letter to D'Angelo asking what LeFevour was supposed to do with the bills. D'Angelo testified that upon receipt of the letter, he personally called LeFevour and told him he had to pay the bill, that it was an embarrassment to have an outstanding account especially with the Avis litigation pending. The judge assured him the bill would be paid. Later, LeFevour obtained yet another voucher which D'Angelo knew about. D'Angelo continued to bill LeFevour and sent numerous dunning letters to LeFevour's home. The secretaries confirmed they were trying to collect the LeFevour account.

LeFevour kept the Avis parking ticket motion under advisement for a considerable period and never did rule on it. The legislature passed an act which eliminated the law suit.

I do believe that attorneys on the other side of the litigation had a right to know about the problem once D'Angelo's firm paid the LeFevour bill. And I do believe that the Code's prohibition of giving anything of value to a judge was violated, even if inadvertently or unintentionally. I do believe D'Angelo's testimony that never at any time did he expect to pay LeFevour's bills, and he did not even know for several months they had not been paid by LeFevour. The secretaries testimony of how the accounts were handled corroborated D'Angelo's

testimony. There is no proof that D'Angelo gained any benefit whatever from LeFevour. There is no proof that D'Angelo was attempting to gain any benefit from LeFevour. The record shows LeFevour solicited the first voucher from D'Angelo (rather than D'Angelo offering it), and there was nothing overtly and ostensibly wrong with the request for a priority reservation (voucher), per se. The record also fails to show that D'Angelo knew of LeFevour's subsequent requests to the secretary.

Another matter in the record that certainly required investigation was the matter of a memo in the file to D'Angelo from his secretary, Pauline Miller, which said:

> "Mr. D'Angelo,
>
> Just a reminder—This bill is for Judge James Murphy—the judge who takes care of our numerous jury summonses for Maybrook and California. I called the First Nat'l Bank today and had the ¢ converted to $.
>
> P."

Because of its inclusion and recitation in the Complaint, together with the allegation that D'Angelo paid the judge's Avis bill, it would lead the reader to the inference that the payment was for "taking care of" the summonses—that a fix was in the works.

However, no such proofs were introduced. The Administrator could have, but did not, call Pauline Miller as a hostile witness. Rather D'Angelo called her to testify on his behalf. The Administrator cross-examined her without successfully impeaching her. For that reason, I believe the Administrator has failed in its burden of proof to demonstrate any prohibited behavior vis-a-vis the content of the memo.

The testimony showed other lawyers at Friedman and Koven and several secretaries had developed a routine system for handling employees' and clients' requests to

re-schedule or be excused from jury duty. Sometimes they handled several jury summonses in one week. For one particular area of the city Judge Murphy was in charge of such matters which were handled by the firm by sending them over to the judge on a routine basis. D'Angelo was not even involved in that procedure. D'Angelo testified that he believed the note had been written to him to remind him who Judge Murphy was (because other people in the firm were requesting the vouchers, the secretary would not necessarily even know that Murphy had obtained the voucher via D'Angelo). It apepar to me that if the memo genuinely referred to "fixing" a summnos, any legally trained person such as D'Angelo would have promptly destroyed it, rather than filing it.

There was no proof of any impropriety in the way the jury summonses were handled by the firm or Judge Murphy. Specifically, there was *no proof* of *any relation* between the Avis voucher and the jury summonses and D'Angelo. The Administrator rests his case on the mere innuendo.

With this background of the case, we must discern what Respondent's intent was in extending the vouchers and paying the delinquent bills or making a gift of a few of the bills. The Administrator wants us to conclude there was a dark and malicious scheme to pervert justice. However, the Board is bound by the record, so let us look at the actual evidence in the record.

While the Administrator is correct that giving any thing of value to a judge is a per se violation of the Code, certainly we must determine the intent behind the gift or delinquent payment before we can impose an appropriate sanction. The intent governs the culpability of the violation. The Administrator comes close to arguing that because we have a per se violation, we must infer an improper intent and impose great punishment. Such a conclusion would clearly be a non sequitur.

There is no evidence, either direct or circumstantial, that the money was paid or intended as a bribe. There is no evidence, either direct or circumstantial, that either Respondent or his firm ever received or expected any benefit in return for the vouchers and payments. There is no evidence, either direct or circumstantial, than any promises were either made or solicited in return for the vouchers and payments. There is no evidence that D'Angelo knew that he paid the bills for most of the named individuals. No ledger of names was prepared by Friedman and Koven until this investigation. There is no evidence that all the recipients necessarily knew D'Angelo paid their respective bills. They may well have assumed he received the gratuity from Avis.

I believe, however, that one could infer from the evidence, because of its wide scale, duration, and the substantial number of public officials involved, that D'Angelo expected that the voucher system, as a whole, would produce the intangible benefit for him and his firm of neutralizing a large number of people in public places. He expected nothing in particular. He was looking for no direct benefit, but he believed the collective service from these officials should be marginally better, or at least not hostile as one sometimes encounters in the bureaucratic realm. This seems somewhat analogous to me to the widespread practice in McHenry County ten years ago of many law firms' distribution of complimentary Christmas liquor among the staffs of the Circuit Clerk, Recorder of Deeds and Sheriff's deputies. Nothing in particular was expected in return, but one hoped it would make for somewhat more attentive service.

Here, D'Angelo's gifts were more expensive, distributed among higher ranks, and particularly because they were also distributed among judges, the practice certainly gave the appearance of impropriety and could bring the legal profesison into disrepute. It could undermine the public's confidence in the justice system.

I believe, however, that D'Angelo's activities must be judged within the historical context of Cook County. I do believe the testimony that everybody in his firm knew it was going on, used it, and thought nothing was wrong with it. Certainly, we must assume that the vast majority of lawyers in that firm were honorable attorneys who would not deliberately commit a professional violation.

Post-Greylord, however, most of them would have a different attitude of propriety today. Prospectively, the activities would be clearly improper. Retrospectively, the failure to disclose the LeFevour account to opposing counsel was improper, but the balance of activities were probably only technically improper if placed within the moral context of the period during which they occurred.

In dispensing justice it is important to reach an equilibrium in the variety of sanctions imposed for any given violation. Here, the Administrator requests disbarment on the theory that this behavior constituted something like a bribe. But there was no proof offered of the elements of a bribe, and there is no proof (or even allegation) of any benefit.

Thus, we are left with the actual proofs in the record—a failure to disclose and other transfers to judges under reasonably innocuous circumstances during the pre-Greylord period.

There is no Illinois case law to assist the Board in determining an appropriate sanction for this type of behavior. It appears to be a case of first impression.

The Respondent has filed a written argument as well as a brief on the applicability of case law from other jurisdictions and a review of the newly adopted 1986 ABA guidelines on sanctions. By looking to these authorities for guidance, we should be able to impose a sanction with consistency and fairness.

I believe Respondent's written Argument at page 12, correctly interprets the applicability of the 1986 ABA guidelines:

> "Mr. D'Angelo is charged in this case with violating Disciplinary Rule 7-110(a) of the Code of Professional Responsibility, Ill. Rev. Stat. ch. 110A. Article VIII, Canon 7, Rule 7-110(a). The standard for imposing sanctions applicable to this disciplinary rule is ABA Standard 6.3. ABA Standards for Imposing Lawyer Sanctions (American Bar Association, 1986) p. 61.
>
> Subdivision 6.31 of Standard 6.3 (*Id.* pp. 42-44) provides that disbarment is generally appropriate when a lawyer '(a) intentionally tampers with a witness and causes serious or potentially significant interference with the outcome of the legal proceeding; or (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially significant interference with the outcome of the legal proceeding; or (c) improperly communicates with someone in the legal system other than a witness, judge or juror' with the same intent and the same actual or potential consequence. Subdivision 6.32 provides that suspension is generally appropriate when a lawyer communicates with 'an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding' There is no evidence that would bring this case within either of those subdivisions of Standard 6.3.
>
> Subdivision 6.33 provides that reprimand (the ABA Standards equivalent of censure in Illinois) is appropriate 'when a lawyer is negligent in determining whether it is proper to engage in communi-

cation with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.' Finally, Subdivision 6.34 of Standard 6.3 provides that admonition (the ABA Standards equivalent of reprimand in Illinois) is 'appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.' "

Further, it appears that virtually all extant case law from other jurisdictions also conforms to the ABA recommended sanctions for censure and reprimand. The following is a direct excerpt from Respondent's Memorandum reviewing the available law:

"II. *The Reported Cases*

The cases discussed in this section are all of the reported cases we have found that decide what should be appropriate dispositions under Rule 7-110(A).

A. *Reprimand cases*

The Pennsylvania Disciplinary Hearing Committee held that two attorneys should be reprimanded for loaning $12,000 to a state court judge. *In re Anonymous No. 2 D.B. 82*, 22 D. & C. 3d 627 (Pa. Disciplinary Hearing Committee 1982); *In re Anonymous No. 3 D.B. 82*, 22 D. & C. 3d 634 (Pa. Disciplinary Hearing Committee 1982). The Hearing Committee stated that the attorneys had technically violated DR 7-110(A), but, because they violated the rule unintentionally and with no wrongful motive, 'the appropriate action is an informal admonition delivered from the standpoint of a sympathetic but concerned colleague cautioning against any activity

which might give any appearance of impropriety.' *In re Anonymous No. 2 D.B. 82*, 22 D. & C. 3d at 634. The Committee in *In re Anonymous No. 3 D.B. 82*, 22 D. & C. at 641, further stated that 'the anguish which this proceeding cannot help but have caused respondent, by having been placed in a position where he had to call upon his friends and business associates to take action on his behalf, has impressed upon respondent the need to avoid even the appearance of violations much more strongly than could any action recommended by this committee.'

The following factors, all of which are relevant here, persuaded the Pennsylvania Hearing Committee to impose the sanction of admonition (equivalent to reprimand in Illinois) instead of a more severe sanction:

1) The Pennsylvania attorneys had no wrongful motive in making the loan; i.e., the loan was not given for the purpose of influencing the judge in his duties.

2) The Pennsylvania attorneys did not intentionally violate the Disciplinary Rules. By their own testimonies, the attorneys were aware of the Disciplinary Rules, but not aware of the prohibition against loans or gift under DR 7-110(A).

3) The Pennsylvania judge initiated the request for the loan.

4) The loans were made from the personal funds of the attorneys.

5) The attorneys expected the judge to repay the loan and the judge assured them that he would, but he never did.

6) The judge and attorneys were longstanding friends. The 'loan was made on the basis of

such relationship and with the intention of helping a friend, and without any intent or thought to procure any advantage for respondent.' *In Re Anonymous No. 2 D.B. 82*, 22 D. & C. 3d at 632.

7) The attorneys made no effort to hide or conceal the fact of the loan to the judge.

8) The Pennsylvania Hearing Committee was impressed with the attorneys' straight-forward presentation of the facts and cooperation with the Committee.

9) Finally, the Pennsylvania Committee considered the attorneys' long periods of practice in the legal profession and service to their community.

B. *Censure cases*

The New York Supreme Court held that censure was appropriate in two cases involving attorneys who paid for the weekend stay at a resort hotel of a judge and his wife. *In re Gerber*, 98 A.D. 2d 581, 471 N.Y.S. 2d 331 (1984); *In re Garson*, 98 A.D. 2d 593, 471 N.Y.S. 2d 610 (1984). In these cases, the court took into consideration the longstanding social relationship between the attorneys and the judge and the fact that the attorneys' conduct was not an attempt to influence the judge. Nevertheless, because there was a technical violation of DR 7-110(A) and the hotels were paid for by the attorneys directly with no expectation of repayment, the court ordered censure.

. . .

In *In re Litman*, 272 N.W.2d 264 (Minn. 1978), the Minnesota Supreme Court held that two attorneys should be censured for loaning $1,000 to a district judge before whom they continued to practice while the loans remained unpaid. The court

considered the following factors in determining the appropriate sanction:

1) The loans were initiated by the judge;

2) The attorneys were longtime acquaintances of the judge; and

3) The judge's impartiality in contested litigation in which the attorneys appeared was not impaired; nor did any litigant suffer harm or loss.

In *Litman*, the attorneys continued to practice before the judge on numerous matters over several years even though they knew the loans to the judge remained unpaid. In addition, there was no evidence that the attorneys attempted to collect the loan from the judge. . . ."

Here, the Administrator was granted leave to comment on the 1986 ABA guidelines (or to reply to Respondent's analysis of same) but never addressed those guidelines. I believe the reason is because the Administrator's proposed sanction cannot be reconciled to the ABA recommendations. Second, the Administrator did brief case law, but his cases on disbarment dealt with bribery, which clearly is not the case here.

Further, this panel decided to defer decision of this case until after the April 25, 1987, seminar conducted for the Hearing Board by the Supreme Court on, among other things, the 1986 ABA guidelines. As I understood the ABA Committee member, the guidelines were developed with the philosophy that the more severe disciplines of disbarment and suspension would be imposed where actual damage was caused by the impropriety and/or where the intent was clearly culpable. More lenient sanctions (censure or reprimand) would generally be imposed when the two elements were not present. In the instant case there is no allegation or proof of any actual damage. There is no proof of any intent to

obtain a benefit in the nature of a bribe or some other similar anti-social expectation. It is further my understanding from that seminar that at least one Illinois case has already looked favorably upon applying those 1986 guidelines to Illinois disciplinary law.

Given the actual proofs in this case and the necessity for consistency of sanctions, I find that censure or reprimand are the only sanctions which could be applied to Respondent to avoid a situation where he is deprived of due process.

I suspect that the Administrator's zeal in this matter is due, to some extent, to the publicity given this particular case, and to Greylord in general, Strictly as a matter of public relations it certainly behooves the Bar to clean house to reassure the public that those lawyers who have bribed judges to fix cases will be promptly disbarred and sent to jail. They should be.

However, if Justice is for all, it must be for every single individual. Mr. D'Angelo need not be offered as a sacrificial goat for the Bar to satisfy its own need of demonstrating to the public that the Bar is cleaning its own house. I submit that there is an extreme difference between disbarring a lawyer for bribing a judge to fix a case as opposed to the proposed disbarment of D'Angelo for failing to disclose to opposing counsel that LeFevour owed him money for rent-a-cars, which, despite numerous and ongoing collection attempts, was not being paid by LeFevour.

I cannot distinguish the facts in the D'Angelo case from the kinds of facts present in the case law and 1986 ABA guidelines, above, where reprimand was determined and recommended as the appropriate sanction.

I find that Mr. D'Angelo has an impeccable record as an attorney who has also developed a city-wide reputation of distinction for his civic service. I am confident

society will continue to reap the benefits of the personal commitment this civic minded individual has to the betterment of Chicago. The record is replete with his significant and beneficient civic contributions.

While I believe private reprimand is the correct sanction, to the extent public censure is arguably correct here, these other factors would mitigate the harsher public punishment in favor of the more lenient and private discipline.

For these reasons, I recommend that Oscar O. D'Angelo be privately reprimanded.

Dated: April 28, 1987

/s/ Sandra Kerrick
SANDRA KERRICK
Hearing Board

APPENDIX E

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 86 CH 211

IN THE MATTER OF: OSCAR O. D'ANGELO,
Attorney-Respondent,
No. 576646.

REPORT AND RECOMMENDATION

[Filed Apr. 25, 1987]

INTRODUCTION

This hearing was originally held on January 28, 1987 and continued to and heard February 23, 1987.

The Hearing Board panel, before whom this complaint was heard, consisted of Mr. Sandra Kerrick, Chairperson, Mr. Charles T. Beckman and Charley Popejoy.

Representing the Respondent were Mr. Philip W. Tone, Mr. William D. Heinz and Ms. Sophia R. Papandreas, all of the firm of Jenner & Block. The Respondent was present throughout the hearing.

Representing the Administrator were Mr. James J. Grogan and Ms. Naomi J. Woloshin.

CHARGES AND ANSWER

The Administrator filed a fifteen count complaint first setting forth background facts. Respondent was licensed to practice law on December 3, 1954.

As a *Background*, it is alleged Respondent was a partner in the law firm of Friedman and Koven; between 1970 and 1985 Respondent served as an attorney for Avis Rent-A-Car Systems, Inc.; he was authorized to issue Avis Company Travel Orders (ACTO); these used to reserve rental cars, confirm credit, arrangements and preferential treatment; the lessee did not have to put up any funds; the ACTO served as a one-time credit card in the nature of a guarantee of payment by Friedman and Koven; the invoice would thereafter be sent to the name and address of the customer provided; if lessee did not pay, Avis would request Friedman and Koven to pay.

Respondent's *Answer* admitted generally the allegations adding certain explanatory remarks as to procedure and questions of payments directly by the lessee, none of which alter the basic background allegations.

COMPLAINT

Each count of the fifteen count complaint have certain allegations in common. To simplify and shorten this report these common allegations are as follows: The Respondent or his secretary issued ACTO's on request of certain Judges and officials or at the suggestion of the Respondent; Avis would then reserve a rental car according to the order; the Judge, etc., would use the rented car; then Avis would invoice accordingly and if the lessee did not pay the invoice, Avis invoiced Friedman and Koven; the law firm would pay the invoice and thereafter would charge Respondent's personal firm account for same. This resulted in Respondent paying the various car rental charges incurred by the Judges, etc., as alleged in the various counts of the complaint.

Certain counts allege Respondent had agreed to pay the charges and the lessee was not expected to pay the car rental charges.

It is further generally alleged Respondent did not disclose to any adverse parties that a rental car had been provided to those lessees set forth in the various counts of the complaint and paid for by the Respondent.

Each count alleges Respondent by said conduct violated rules (a) through (e) as set forth as follows:

a) violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in actions prejudicial to the administration of justice;

b) violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

c) violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation;

d) failed to avoid even the appearance of an impropriety in violation of Canon Nine of the Illinois Code of Professional Responsibility; and

e) violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

COUNTS ONE THROUGH FIVE

Counts One through Five relate to allegations involving Judge Richard LeFevour, Chief Judge of the Traffic Division of the First Municipal District; presided over the case of *City of Chicago v. Hertz Commercial Leasing Corporation*, consolidated 68 MC 50305. The City sought to recover the payment of fines from Avis and the other

defendants as registered owners of vehicles allegedly parked in violation of municipal ordinances.

During the proceedings, Avis was represented by Friedman and Koven, with Respondent (a partner) appearing before the court from time to time along with other members of the firm. This suit had been filed in 1967. On April 4, 1972, the Circuit Court ruled in favor of Avis and the other defendants. On April 26, 1976, the Appellate Court reversed. The Supreme Court of Illinois affirmed on April 3, 1978. The case was returned to the Circuit Court of Cook County in 1979. Judge LeFevour assigned the case to himself. Between 1979 and 1981 pretrials were conducted and Respondent appeared on several occasions for Avis; LeFevour remained assigned to the case even after being transferred.

On November 3, 1981, oral arguments on motions were conducted before Judge LeFevour. He advised all he would be out of town for several weeks but would rule on the motion in the very near future. During the summer of 1984 Judge LeFevour took a leave of absence from his duties as Judge. He never ruled on the motions.

During April 1982 Judge Richard LeFevour informed Respondent he was having difficulties in reserving a car for use in Phoenix, Arizona. Respondent had an ACTO delivered to LeFevour's chambers enabling him to secure an Avis rental car in Phoenix, also receiving a 40 percent discount.

Avis mailed an invoice in the amount of $128.87 to the Judge at his home. He never paid it and on or about May 14, 1982, Respondent's personal account at Friedman and Koven was charged.

Judge LeFevour never reimbursed Respondent any portion of the Avis invoice.

Respondent never informed any party or their legal representatives that he had paid $128.87 car rental on behalf of the Judge.

COUNT TWO

In August, 1982 on request of Judge LeFevour, Respondent arrange personally or by his secretaries for a rental from Avis in Dublin, Ireland. The Judge did not pay the invoice of $1,114.84 and Friedman and Koven paid in December 14, 1982, and charged Respondent's personal account at the firm. The Judge never reimbursed the Respondent for any portion thereof. Again, Respondent never informed any party or their legal representatives that he had paid the $1,114.84.

COUNT THREE

On or about November ~~10~~, 1982, Virginia LeFevour, wife of the Judge LeFevour obtained an ACTO for an Avis rental car for Fort Lauderdale, Florida; used the rental car and Avis billed her in care of Friedman and Koven for $94.88. The ACTO had been issued by the Respondent or his secretary. Friedman and Koven paid the bill on or about November 30, 1982 and charged Respondent's personal account at the firm. LeFevour never repaid any amount thereof. Respondent did not disclose this fact to other parties to the action.

COUNT FOUR

On December 21, 1982, Judge LeFevour requested an Avis rental car for use in Sarasota, Florida, and also New Orleans, Louisiana. He did use Avis rental cars accordingly and an invoice in the amount of $350.84 was never paid by Judge LeFevour; Friedman and Koven paid it, charged Respondent's personal firm account; Respondent did not advise any persons involved in the said litigation.

COUNT FIVE

On or about August 3, 1983, Judge LeFevour or his wife requested an Avis rental car to be used in Dublin, Ireland; it was made available; Avis invoiced for the

use of the car in the amount of $821.39. The LeFevours never paid it; Friedman and Koven paid it and charged Respondent's personal account at the law firm on or about May 17, 1984; no notice given to other parties to the pending case.

COUNT SIX, ETC.

These counts relates to the actions involving Judge James E. Murphy, Judge of the Circuit Court of Cook County, late 1977 or early 1978 the Judge requested two Avis rental cars from Respondent for use in New York; Respondent informed the judge no payment would be necessary, a gift from the Respondent; the Judge used the cars, never paid for their use; Respondent's personal account at the law firm was charged.

COUNT SEVEN

Avis rental car was arranged for Judge James E. Murphy for a trip to Ireland in May, 1980. The invoice for 153.86 (Irish pounds) was sent to and paid by Friedman and Koven, and charged to Respondent's account. ($363.58 in U.S. money.)

Respondent was advised by memo from his secretary "this bill is for Judge Murphy—the Judge who takes care of our numerous jury summons . . ."

Friedman and Koven paid the Judge's invoice and charged Respondent's personal account. Judge Murphy never reimbursed Respondent for the use of the Avis rental car in Ireland.

COUNT EIGHT

During 1981, Judge James E. Murphy, through the same procedure obtained an Avis rental car for use in Florida; never paid for the rental; around July 23, 1981 Friedman and Koven paid $307.37, and charged Respondent's personal firm accounts.

COUNT NINE

During 1982 Judge James E. Murphy followed the same procedure and obtained an Avis Rental Car for use in Fort Lauderdale, Florida; he never paid for its use; May 14, 1982, Friedman and Koven paid $375.44 for it, and charged Respondent's personal firm account.

COUNT TEN

During 1982, Judge Allen Rosin, through the same procedure obtained an Avis car rental through Respondent for use in California. The invoice in the amount of $418.42 was issued and on October 27, 1982, Friedman and Koven paid the bill and charged Respondent's personal firm account.

COUNT ELEVEN

This count was dismissed by agreement of the parties.

COUNT TWELVE

Circuit Court Judge John F. Hechinger was informed by Respondent late in the 1970's or early 1980's that Avis was his client; to contact Respondent's secretary to make arrangements; between 1980 and 1984, the Judge arranged for rentals and the usual procedure followed. On May 2, 1980, an invoice in the amount of $308.24 was paid by Friedman and Koven; again on May 1, 1981, an invoice in the amount of $433.06 was paid by Friedman and Koven, both charged to Respondent's personal firm account. Attorneys associated with Friedman and Koven would appear on occasion in cases pending before this Judge.

COUNT THIRTEEN

During early mid-1983, Respondent offered to obtain an Avis rental car for Circuit Court Judge Richard H. Jorzak. After the usual procedure, this Judge did use an Avis rental car and on or about January 18, 1984,

a $458.93 Avis bill for this Judge in rental while in Florida was paid by Friedman and Koven and charged against Respondent's personal firm account.

COUNT FOURTEEN

During 1983, Respondent offered to obtain an Avis rental car for Judge Frank W. Siracusa, Judge in the Circuit Court, for use in Florida. Thereafter, following the same procedure, a rental car was used by the Judge. On or about May 17, 1983, an Avis bill in the amount of $208.63 for the rental was paid by Friedman and Koven, and charged to Respondent's personal firm account.

COUNT FIFTEEN

During the years of 1980 through 1984, Respondent practiced law in Chicago; concentrated his practice to real estate, commercial and municipal law; members of his immediate family were active in real estate investments and development in Chicago; and through procedures previously explained, Respondent provided Avis Company Travel Orders to various elected and public officials of Chicago as set forth herein:

a) Richard J. Brzeczek—Superintendent of Police, City of Chicago;

b) Gilbert J. Cateldo—Commissioner, Department of Housing, City of Chicago;

c) William L. Duggan, Commissioner, Inspectional Services, City of Chicago;

d) Edwin A. Gausselin, First Deputy Corporation Counsel, Department of Law, City of Chicago;

e) Thomas Kapsalis, Commissioner, Department of Aviation, City of Chicago;

f) John W. McCaffrey, Chief Assistant Corporation Counsel, Revenue division, Department of Law, City of Chicago;

g) Herman Moses, Director of Licensing, Bureau of Licensing, Registration and Permits, Department of Inspectional Services, City of Chicago;

h) Martin Murphy, Chairman of the Commission of Urban Renewal, City of Chicago;

i) Timothy D. O'Hara, Chief Assistant Corporation Counsel, Torts Division, Department of Law, City of Chicago;

j) Eugene Ray, Alderman, City of Chicago;

k) Miguel A. Santiago, Alderman, City of Chicago;

l) David F. Schultz, Budget Director, Office of Budget and Management, City of Chicago; and

m) Henry F. Weber, Assistant Corporation Counsel, City of Chicago.

Various Avis bills for cars used by some of the above were presented to Friedman and Koven for payment and were thereafter charged to Respondent's personal firm accounts.

ANSWER TO COMPLAINT

Attorney Philip W. Tone, representing Respondent states in his opening statement, "Mr. Grogan is correct in saying that the operative facts in this case are not in dispute" . . . "The issue is really the purpose for which these things were done." There is no evidence whatsoever that anything was expected or given in exchange for the making of rental cars available, and the issues to be drawn or the inferences to be drawn from the facts are really the only matters of dispute before us so far as the facts are concerned. (Tr. 1/28/87, pg.8).

Further, quoting from page 37 of Respondent's Answer to the Complaint, it states, "He did not violate the substance and spirit of the rule, for the reason that he

did not make any ACTO available to a person because that person was a judge, but did so because it was Mr. D'Angelo's practice to make such ACTO's available to friends and acquaintances in all walks of life without seeking or obtaining anything in return." "If any instance in which Mr. D'Angelo made an ACTO available with the intention of paying the rental fee for the car, he did so for reasons of friendship and generosity with no expectation of receiving anything in return."

FINDING OF FACT

The attorney for the Administrator and attorney Philip W. Tone for the Respondent agreed the operative facts in this case are not in dispute.

The undersigned find that the Administrator has proven the following facts by clear and convincing evidence.

1. Respondent engaged in the practice of law in the City of Chicago at all times material in the Complaint filed by the Administrator.

2. Respondent was also engaged and active in commercial real estate investment and development in the City of Chicago with his brother. Respondent was an inactive partner.

3. Over the last fifteen years Respondent has invested in properties:

> "3520 Lake Shore Drive, a large apartment building; 5040 Marine Drive, a large amount building; 5100 Marine Drive, a large apartment building; 230 East Ontario, a large amount building; 65 East Scott, an apartment building; 10 West Elm, an apartment building.
>
> The Civic Opera Building where the Lyric performs is owned by my brother and I have a portion of.

A small portion, I might add. The 310 Michigan Avenue building, which is the old CNA building with the blue beacon on the top. It's on the corner of Jackson Michigan.

Q. Now, in regards to the apartment buildings that you mentioned, were these relatively small units that were contained in these apartment buildings or were there a lot of units to the buildings?

A. They were all in excess of a hundred units." (Tr. pg.79).

4. Respondent represented Avis Rent-A-Car Systems, Inc., (hereinafter referred to as Avis) in his capacity as one of the Chicago Attorneys.

5. As such he and/or his secretary set up a procedure for ordering rental car request at Avis. This procedure assured the renter of having a car waiting upon arrival. It also in effect amounted to a credit card guarantee for payment of the invoice. As a partner in the law firm, Friedman and Koven did guarantee payment if the renter did not pay. The order form was known as AOTA.

If the renter did not pay the invoice within a reasonable time, then Avis billed Friedman and Koven. The firm would pay the bill then charged Respondent personal firm account for payment.

6. Respondent was a senior partner in the firm of Friedman and Koven and was on the Executive Committee until the firm dissolved during early 1986.

7. Respondent did personally or through his secretary arrange on request of certain Judges in the Circuit Court of Cook County or certain public officials of the City of Chicago or as invited to request a rental car by Respondent an Avis rental car. Respondent thereafter

paid for use of the rental car through his firm's personal account at Friedman and Koven. The judges and public officials involved are as follows:

(a) Judge Richard LeFevour was Chief Judge of the Traffic Division of the First Municipal District of the Circuit Court of Cook County. Later he was transferred and appointed Presiding Judge of District One, Municipal Department, Circuit Court, Cook County.

Judge LeFevour (and/or his wife) rented Avis cars five different times during 1982 and 1983 for in excess of $2,500.00 in charges. Respondent through the regular procedure paid for all of them.

During this time Judge LeFevour was assigned and did preside over hearings in the case entitled, *City of Chicago v. Hertz Commercial Leasing Corporation, Avis Rent-A-Car Systems, Inc., and Chrysler Leasing Corporation*, case number 68 MC 50305 in which Respondent appeared from time to time as attorney for Avis.

At no time did Respondent inform any of the parties or their attorneys that he had paid the rental charges incurred by the Judge.

The Judge took the case under advisement and never ruled on it prior to taking a leave of absence in 1984.

(b) James E. Murphy, Judge of the Circuit Court of Cook County during 1977 or early 1978 requested two cars for New York; Respondent advised the judge it would be a gift. Respondent paid the invoice and Judge Murphy never paid for the use of the Avis rental.

Again Judge James E. Murphy arranged for a rental car for a trip to Ireland in May, 1980 by the usual procedure. Respondent learned through his secretary the invoice had been received by the firm and advised Respondent by the following memo:

"Mr. D'Angelo,

Just a reminder—this bill is for Judge James Murphy—the judge who takes care of our numerous jury summonses for Maybrook and California. I called the First Nat'l Bank today and had the £ converted to $." [Exhibit 20(d)].

Respondent's account was charged in the usual manner. The Judge never reimbursed Respondent.

Again in 1981 Judge James E. Murphy secured an Avis rental for Florida; never paid the invoice and Respondent paid for it.

Again in 1982 Judge James Murphy secured a car for Florida and through the same procedure Respondent paid the invoice and the judge never reimbursed Respondent for it.

(c) During 1982 Judge Allen Rosin of the Circuit Court of Cook County contacted Respondent and the same procedure followed after which Respondent paid $418.42 and was never reimbursed.

(d) Between 1980 and 1984 Judge John F. Hechinger of the Circuit Court of Cook County obtained two Avis rental cars by the usual procedure and Respondent paid $308.24 on May 2, 1980 and $433.06 on May 1, 1981 and was never reimbursed. Members of the firm would appear before this Judge during the time material.

(e) During mid-1983, Respondent offered to obtain an Avis rental car on behalf of Judge Richard H. Jorzak; arrangements were made and the usual procedure was followed. In January, 1984 the invoice of $458.93 was paid by Friedman and Koven and thereafter by Respondent. The Judge did not reimburse Respondent at any time.

(f) During 1983, Judge Frank M. Siracusa following the same procedure, obtained an Avis car for Florida;

in May 17, 1983, an invoice of $208.63 was paid by Friedman and Koven and charged to Respondent.

(g) During the years 1980 through 1984, Respondent provided Avis Cars to certain elected or appointed public officials and by the same procedures, Respondent paid the charges and was never reimbursed by the renters; as follows:

(1) Richard J. Brzeczek—Superintendent of Police, City of Chicago;

(2) Gilbert J. Cataldo—Commissioner, Department of Housing, City of Chicago;

(3) William L. Duggan, Commissioner, Inspectional Services, City of Chicago;

(4) Edwin A. Gausselin, First Deputy Corporation Counsel, Department of Law, City of Chicago;

(5) Thomas Kapsalis, Commissioner, Department of Aviation, City of Chicago;

(6) John W. McCaffrey. Chief Assistant Corporation Counsel, Revenue division, Department of Law, City of Chicago;

(7) Herman Moses, Director of Licensing, Bureau of Licensing, Registration and Permits, Department of Inspectional Services, City of Chicago;

(8) Martin Murphy, Chairman of the Commission of Urban Renewal, City of Chicago;

(9) Timothy D. O'Hara, Chief Assistant Corporation Counsel, Torts Division, Department of Law, City of Chicago;

(10) Eugene Ray, Alderman, City of Chicago;

(11) Miguel A. Santiago, Alderman, City of Chicago;

(12) David F. Schultz, Budget Director, Office of Budget and Management, City of Chicago; and

(13) Henry F. Weber, Assistant Corporation Counsel, City of Chicago.

8. The Respondent never informed any other opposing attorneys or parties involved in legal matters in court that he had paid Avis rental bills for certain judges or public officials.

9. The Avis cars listed in the Administrator's Complaint were used in such places as Ireland; Nice, France; New York; Washington, D.C.; Florida; Arizona; California; Hawaii and Puerto Rico.

10. Respondent's practice in law included municipal and public financing, real estate transaction, issuance of bonds for corporations not for profit and zoning matters involving municipalities.

11. Some of the judges for whom Avis rental bills were paid by Respondent were assigned to traffic court, housing courts and chancery.

12. The officials held such positions as a high official in the Chicago police department and later superintendent of police, City of Chicago; Commissioner, Department of Housing; Commissioner, Inspectional Services; First Deputy Corporation Counsel, Department of Law; Commissioner, Department of Aviation; Chief Assistant Corporation Counsel, Revenue Division, Department of Law; Director of Licensing, Bureau of Licensing, Registration and Permits, Department of Inspectional Services; all City of Chicago; also Alderman, City of Chicago.

13. The law firm of Friedman and Koven dissolved in 1986. The Respondent with certain other members of that firm joined the law firm of Altheimer and Gray. Respondent engaged in the same fields of law as he did previously.

14. Respondent testified the practice as to Avis and his paying for car rentals was well known around the

court house; that he saw nothing wrong with it; saw no impropriety. He did discontinue the procedure when he found out his actions were being investigated.

15. After it became public in the newspapers, Friedman and Koven terminated the ACTO's. "Prior to that time, nobody in that firm thought it was a terrible thing." (Tr. pg. 97).

16. Respondent was acquainted with what might be regarded as a bribe. We quote the following portion of the transcript commencing on page 81 (January 28, 1987) as follows:

> In one instance Peter and Tammy Gould wanted to speculate in our community and they said, "We would like to give you 10 percent of anything that we did in the near west side by merely accommodating us since you've been there all your life and you flicked chickens and cut meats and you know everybody there and you delivered groceries until 8:00 o'clock at night. You know. We're new people to the community. We would like to give you 10 percent for nothing except to open up doors."
>
> And I said, "Under no circumstances would I do that. I'll not regard what you said as a bribe. Otherwise I would throw you out the window." And this conversation took place at the firm of Pfeiffer & D'Angelo. "I'm offended by the offer." And they understood that.
>
> Sometime thereafter they send me $600 worth of luggage from Gucci and I sent it back and I said, "I appreciate very much your doing that. We don't have the kind of relationship that warrants that. Why don't you just buy me dinner?" Which is what they did at Presidential Walk I think it was, precursor to Fisherman's Meat Market or Fisherman—Nick's Fishmarket.

I might add, Mr. Grogan, just to bring closure to that vignette, that sometime thereafter they did buy six apartment buildings and they came to see me as chairman of the conservation council to approve the plans. And they had store conversions which merely had the plate glass and they just casually converted it to an apartment.

And at the time on my committee was the dean of the University of Illinois School of Architecture, Mr. Leonard Curry, and he and I thought it was a very insensitive way to treat it. And I said, "You have to take the plate glass out, brick the building exactly as it was, as though there were never a store there in the first instance, bring the windows down to the exact type that exists through the rest of the building." And he said, "That's going to cost me 60 or 70 thousand dollars." I said, "Sir, that is why I didn't take the Gucci and that is why I didn't take the 10 percent."

17. Respondent was a member of the Near West Side Conservation Community Council for one year and then the late Mayor Daley appointed Respondent as chairman of the council, chairman since 1960. Respondent represents Rush Presbyterian St. Luke's and has represented them for the last 13, 14 years.

18. Respondent individually testified rental cars were made available to over 150 individuals "through my office". (Tr. 2/29/87 pg. 333).

"The procedure for obtaining the cars for billing, for the handling of the bills when they came if they did come to (F & K) were all the same with respect to every one of those more than 150 people for whom the rentals were made available. (Tr. 1/28/87 pg. 9) (Counsel for Respondent).

The Administrator obtained records of Respondent's law firm personal account admitted in the record of evi-

dence in this hearing as Adm.Ex.19(a) and Adm.Ex.19 (b). These records show only 89 charges (not 150 individuals). Of the 89 Avis charges to Respondent, the Administrator's complaint filed by the Administrator relates a total of 46 charges by 18 individuals.

CONCLUSION OF FACT AND LAW

The complaint filed against the Respondent alleges the following:

(a) Respondent violated Rule 1-102(a)(5) in that he engaged in conduct that is prejudicial to the administration of justice.

(b) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(d) A lawyer should avoid even the appearance of professional impropriety.

(e) Conduct of attorneys which violates the Code of Professional Responsibility contained in Article VIII of these rules or which tends to defeat the administration of justice as to bring the courts and the legal profession into disrepute shall be grounds for discipline by the Supreme Court of Illinois.

Respondent individually and by his counsels, suggests defenses or excuses and also suggest mitigation as follows:

1. There was nothing surreptitious or covert about what happened.

2. There was no secret whatsoever of it.

3. Respondent had no knowledge of the Code of Professional Responsibility although he knew of legal ethics.

4. Rental of Avis cars were done as a courtesy and not with the expectation of receiving anything in return.

5. If a judge (or public official) was a friend of the Respondent he could tell them that it was unnecessary to pay, that the car was a gift from him or that the car was to be provided without expense.

6. Respondent's conduct was engaged in without malevolent or evil intent.

7. Respondent's conduct was carried on with the knowledge of people not only in the law firm of Friedman and Koven but with people all over town. It was generally known.

8. Respondent presented character witnesses whom testified he enjoyed the highest character, etc. Much of this testimony covered various and many Pro Bono services by the Respondent.

Not one of the suggested defenses or excuses for Respondent are provided as exceptions to the rules and therefore cannot be a defense to his alleged misconduct.

Judge Richard LeFevour was presiding over a case in which the City of Chicago was suing various party defendants, Avis rentals being a defendant. Respondent was the attorney for Avis in that case and Respondent and other members of his firm appeared in the proceedings. During this time, Respondent made Avis rental cars available to Judge Richard LeFevour, the presiding judge and over a period of time paid over $2,500.00 in rental cost. Respondent never received reimbursement from Judge LeFevour and more importantly Respondent never advised anyone involved in the case that he had paid the car rental bills for the presiding judge. Being a friend, political or social or both could not excuse him under the rules.

Judge James E. Murphy became acquainted with Respondent when presiding in one of the Housing Courts; Judge John Hechinger was in chancery in which Respondent's firm had pending cases; Judge Richard Jorzak was in a Housing Court; Richard Brzeczek was a high ranking officer in the City of Chicago Police Department, later became Superintendent of the City of Chicago Police Department with 14,400 policemen under his command. The Chicago Police Department is responsible to enforce City of Chicago laws and ordinances, zoning, building permits, etc.

Others included in the Administrator's Complaint were employees in City of Chicago Departments of inspections, etc.

Another was an alderman who was chairman of the Housing Committee. Respondent met him in the corridor of City Hall and offered him an Avis rental car to be used in Puerto Rico. Two out of a total of three times, Respondent paid for the rental charges; the third time the charges were presented to Respondent after the subject matter received media attention. Respondent returned the invoice to the Alderman with instructions he would have to pay it himself.

One rebuttal to Respondent's contention he never received anything from those having car rentals paid by Respondent is the memo identified into evidence as Administrator's Exhibit Twenty(d) quoted herein as follows:

> "Mr. D'Angelo,
>
> Just a reminder—this bill is for Judge James Murphy—the judge who takes care of our numerous jury summonses for Maybrook and California. I called the First Nat'l Bank today and had the ¢ converted to $." [Exhibit 20(d)].

Respondent's contention that he saw nothing inappropriate or improper for his conduct is rebutted by his own testimony previously quoted herein in which he considered an offer to him of luggage valued at $600.00 as a bribe. Respondent's payments of Avis invoices were in excess of $10,000.00.

I do not see that the particular Pro Bono evidence in anyway mitigate his misconduct. Character witnesses explained how he would get the job done; some sought his help and advice and depended upon his abilities.

I think of the symbol of justice, the blindfolded lady with the scale of justice. Respondent has over $10,000.00 on one side of that scale.

The facts, exhibits and the circumstances surrounding the allegations in the Complaint filed by the Administrator and the Answer of record on behalf of the Respondent leaves no room for doubt as to Respondent's misconduct.

The Administrator has proven by clear and convincing evidence the allegations against the Respondent. The facts alleged in his Answer are not an answer or defense. I find no mitigation to Respondent misconduct. Motive and intent are rarely the subject of direct testimony, that they must ordinarily be inferred from conduct and from circumstaces. *In Re: Terrill Schwarz*, 51 Ill.2d 334.

The Respondent's own testimony of his payments of car rental charges exceeding $10,000.00 on behalf of the judges and certain public officials shows conduct that tends to defeat the administration of justice and bring the courts and the legal profession into disrepute.

Therefore, the undersigned does find the allegations of misconduct against the Respondent have been proven by clear and convincing evidence.

RECOMMENDATION

Let the record show in addition to the hearing of evidence, reading the transcript, viewing and studying the exhibits, reviewing opening and closing statements; I have reviewed and consider Respondent's Motion for Leave to File Instanter Supplement to Oral Argument; Affidavit of Philip W. Tone; Argument Supplementary to Oral Argument; Ms. Sandra Kerrick's letter of March 3, 1987 setting forth her views and questions.

One can consider what other hearing bodies have done or recommended; what other jurisdictions have and are doing; what has been the recommendations in other hearings in Chicago or in any other place or community.

However, it is the responsibility of this particular panel on this very specific set of facts to decide the facts, motive, intent and the effect of it all on this community, the legal profession of the City of Chicago. As an example, what effect all this would have in Aurora, Joliet, Ottowa, etc., is not necessarily applicable to the City of Chicago.

It is common knowledge in Chicago that a lawyer is retained often based upon who he knows; what connections he has; clout.

The argument Supplementary to Oral Arguments filed by Counsel for the Respondent is not persuasive and does not add credibility to a member of the bar violating a clear and unambiguous rule.

The last remaining question is the quantum of discipline.

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession and of the courts.

I find the facts and circumstances in this case have been of an extremely serious nature covering a long period of time without any mitigating facts.

It is the recommendatioan of the undersigned member of the hearing panel that Oscar O. D'Angelo be disbarred.

/s/ Charley Popejoy
CHARLEY POPEJOY

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCICLINARY COMMISSION

Administrator's No. 86 CH 211

IN THE MATTER OF: OSCAR O. D'ANGELO,
Attorney-Respondent,
No. 576646.

SUPPLEMENT

[Filed Apr. 25, 1987]

REPORT AND RECOMMENDATION

In compliance with the Supreme Court of Illinois' order that this proceeding be expedited, a Report and Recommendation was prepared on March 17, 1987 (hearing completed February 23, 1987). This report was submitted to the Hearing Panel for Review and consideration.

Since March 17, 1987, the Respondent by his Counsels has sought leave to file instanter Respondent's memorandum on applicable precedents and guidelines, filed March 23, 1987.

The attorney for the Administrator presented his objections to motion for leave to file a memorandum instanter.

The Chair granted Respondent's motion and allowed Respondent to file the memorandum.

The Counsel for the Administrator has filed his memorandum in answer.

Now having reviewed all the above additional material, it is my opinion the additional material in no way changes my original opinion.

The Administrator has proven its case by clear and convincing evidence.

Respondent's misconduct was often repeated—a total of 46 times covered by the complaint involving 18 persons. All were Judges, Superintendent of police, lawyers employed by the Corporation Council's office, plus two alderman, one was the chairman of the housing committee as an alderman.

To repeat myself, the so called gifts to the so called friends involed paying over $10,000 primarily to people in power, in housing Courts and enforcement agencies for the City of Chicago.

The evidence clearly indicates the Respondent is regularly involved in housing matters.

Friendships and generosity was not the motivation.

I again recommend Respondent be disbarred.

/s/ Charlie Popejoy
CHARLIE POPEJOY

APPENDIX F

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 86 CH 211

IN THE MATTER OF: OSCAR O. D'ANGELO,
Attorney-Respondent,
No. 576646.

PREFACE

[Filed May 6, 1987]

The hearing board was unable to reach a majority opinion as to the sanction to be imposed on the respondent and therefore the panel is submitting individual opinions and recommendations for consideration by the Board of Review.

INTRODUCTION

CHARGES AND ANSWER

ANSWER TO COMPLAINT

For purposes of this opinion, I incorporate the Introduction, Charges and Answer and Answer to Complaint portion of panel member Charley Popejoy's opinion as if stated herein verbatim.

FINDINGS OF FACT

I incorporate the findings of fact contained in Charley Popejoy's opinion and concur in all of the findings of facts contained therein.

CONCLUSIONS OF FACT AND LAW

The complaint filed against the respondent alleges the following:

(a) Respondent violated Rule 1-102(a)(5) in that he engaged in conduct that is prejudicial to the administrative of justice.

(b) The lawyer shall not give or lend anything of value to a judge, official, or an employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of the candidate for such office.

(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) A lawyer should avoid even the appearance of professional improprieties.

(e) Conduct of attorneys which violates the Code of Professional Responsibility contained in Article VIII of these rules or which tends to defeat the administration of justice as to bring the courts and the legal professional disrepute shall be grounds for discipline by the Supreme Court of Illinois.

The factual allegations of the complaint are admitted, with some explanatory material. Payment of rental cars for Judge Richard Le Fevour, Judge James E. Murphy, Judge Heckinger, Judge Rosin, Judge Jorzak, and Judge Siracusa are clearly in violation of the Code of the Professional Responsibility. It is no excuse to said violation that respondent was unaware of the rule. The payment of rental cars for Judge Richard Le Fevour is particularly egregious since he was presiding over a case in which respondent was a party litigant. It is admitted that at no time during the pendency of said cause did respondent inform any of the other parties to the action that payments were made on behalf of the presiding judge for rental cars. The evidence shows that Judge

Richard Le Fevour retained the Avis case, and made no substantive ruling after having received Avis rental cars from respondent, though hearings on motions had been held. Whether this benefited respondent or his client or injured any other party is a matter of conjecture only. The balance of car rental payments for judges were to judges with whom respondent was acquainted and before whom no cases of Friedman and Koven were pending at least to the knowledge of respondent. Of particular significance is Exhibit 20(d) which is a note from respondent's secretary to him as follows:

> "Mr. D'Angelo,
>
> Just a reminder—this bill is for Judge James Murphy—the judge who takes care of our numerous jury summons for Maybrook and California. I called the First National Bank today and had the £ converted to $."

Thus it appears that it was of some benefit to respondent and his law firm to be on "good terms" with judges who were in a position to excuse people from jury duty. It infers that payments were made not to obtain a specific benefit from any judge, but to have the ability to request "certain factors" from a judge.

That respondent is a highly qualified, highly skilled professional is not disputed. The evidence clearly showed that respondent while employed with the firm of Friedman and Koven was a member of the executive committee and was one of the top three partners insofar as compensation is concerned. Likewise, at the firm of Altheimer and Gray he is a member of the executive committee and one of the top partners insofar as compensation is concerned. Various witnesses testified to respondent's good moral character, to his pro bono work in the community, and to his reputation for truth and ver-

acity. These matters are taken not as a defense to the conduct, but in mitigation, or aggrevation, of the charge.

RECOMMENDATION

In addition to the testimony, the Exhibits and Pleadings, the hearing board accepted and reviewed post-trial motions and supplemental closing arguments, all of which are contained in the file, and have been considered by this board member in reaching a decision. When weighing the seriousness of the offense here charged, and I believe the offense is very serious, I believe that had there been any showing of actual prejudice to a party litigant, a recommendation of disbarment would be warranted.

Under the facts and circumstances of this case, however, and in view of the respondents otherwise good record, (no other complaints having been filed against respondent in excess of twenty (20) years), respondent's willingness to cooperate with the commisison and forthrightous in testifying are factors in mitigation against disbarment.

The purpose of a disciplinary proceeding is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession and of the courts. Those who have attained prominence must be the leaders in maintaining that integrity.

Mr. Justice Clark, concurring in part, dissenting in part, in *In re Kien* (1977) 14 Ill.Dec. 365, 372 N.E. 2d 376 states, "When misconduct is clearly shown, . . ., it should be punished in accordance with the degree to which it undermines the integrity of the profession, the administration of justice, and public confidence therein. Thus, . . ., prominence in the profession and public offices involving the skills and training of an attorney summon an even higher standard of care than does the office of attorney and counselor itself, because the actions

of lawyers in such positions have a crucial impact upon public confidence in the rule of law." That respondent is a person of prominence in the legal progession in not disputed. That he has attained a degree of success, skill, training and expertise which sets him apart from other members of the profession is likewise not disputed.

It is my recommendation that Oscar O. D'Angelo be suspended from the practice of law for a term of one (1) year.

DATED: May 1, 1987.

/s/ Charles T. Beckman—KGJ
CHARLES T. BECKMAN
signed per Charles T. Beckman's
approval on 5-6-87

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-818

OSCAR O. D'ANGELO,
Petitioner

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 29, 1989.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 12th day of April, 1989.

Supreme Court, U.S.
FILED
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 USC §1257(3).

II. WHETHER THE PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONER FOR HIS VIOLATION OF LONG-ESTABLISHED ETHICAL PRINCIPLES VIOLATED THE DUE PROCESS REQUIREMENT OR EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

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No. 88-2130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

vs.

ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. CONST. art I, §10.

The due process clause of the United States Constitution provides, "Nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 U.S.C. § 1257.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

Supreme Court Rule 753(c)(6). Inquiry, Hearing, and Review Boards. Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

Supreme Court Rule 7-110(a). Relationship with Officials. (1980)

(a) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Supreme Court Rule 7-110(a). Relationship (Amended 1988)

"(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loan which a judge or a member of his family may receive under Rule 65(c)(4) of the Code Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Supreme Court Rule Canon 9. Avoiding Even the Appearance of Impropriety (1987).

Supreme Court Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an

invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; loan from a lending institution in its regular course of business on the same terms generally available to persons who who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction. Respondent will address in Argument those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

STATEMENT OF THE CASE

On September 10, 1986, the Administrator of the Attorney Registration and Disciplinary Commission filed a fifteen count complaint against Petitioner pursuant to Illinois Supreme Court Rule 753. Petitioner was charged with giving things of value to judicial and political officials in violation of the Illinois Code of Professional Responsibility. On October 7, 1986, Petitioner's answer was filed. Subsequently, discovery ensued.

Hearing was conducted on January 28, 1987 and February 23, 1987. During the course of hearing, the Administrator moved to dismiss one count of the Complaint. Evidence was introduced to support each of the remaining counts.

On April 25, 1987, the reports of two members of the Hearing Board were

filed. Both members believed that Petitioner had engaged in professional misconduct. One member determined that disbarment was an appropriate sanction, the other recommended a private reprimand. On May 6, 1987, the report of the third member of the Hearing Board was filed. That member agreed that Petitioner had engaged in misconduct and recommended that he be suspended from the practice of law for one year.

On May 8, 1987, Petitioner filed exceptions to the Hearing Board report. Subsequently, the issues were briefed and argued before the Review Board.

On November 13, 1987, the report and recommendation of the Review Board was filed. The members of the Review Board unanimously determined that Petitioner's violations of the Code of Professional Responsibility were egregious and

recommended that he be suspended from the practice of law for two years.

On November 23, 1987, the Administrator filed a petition for leave to file exceptions with the Supreme Court of Illinois. The Administrator excepted to the recommendation of suspension and asked that Petitioner be disbarred. On November 24, 1987, Petitioner filed his exceptions to the report and recommendation of the Review Board. Petitioner excepted to both the findings and recommendation of the Review Board.

On February 3, 1988, the Court allowed the Administrator's petition for leave to file exceptions and the Petitioner's exceptions.

On December 15, 1988, after considering briefs and oral arguments, the Supreme Court of Illinois issued an order disbarring Petitioner from the practice of law.

On January 19, 1989, Petitioner filed a Petition for Rehearing with the Supreme Court of Illinois, raising a federal question for the first time. On January 30, 1989, the Supreme Court of Illinois denied the petition without ruling on the federal question. (Pet. App. 13a).

On February 1, 1989, Petitioner filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit Petitioner time to seek review in the Supreme Court of the United States. On February 7, 1989, the Supreme Court of Illinois issued an order staying the mandate.

On February 15, 1989, Petitioner filed a Motion for Reconsideration with the Supreme Court of Illinois. On February 17, 1989, the Supreme Court of Illinois issued an order denying Petitioner's Motion for Reconsideration.

On June 29, 1989, Petitioner filed his Petition for Writ of Certiorari to the Illinois Supreme Court with the Clerk of the United States Supreme Court.

On July 5, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari filed with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that he fits within any exception as he had

reason to expect that the Court would decide the case as it did.

Second, in disciplining Petitioner, the Supreme Court of Illinois did not retroactively apply a new standard to Petitioner's acts of misconduct in violation of the ex post facto clause. Petitioner's conduct was violative of the former construction of Rule 7-110(a) of the Illinois Code of Professional Responsibility as well as the new construction.

Third, Petitioner was not denied due process of law during the course of the disciplinary proceedings against him. Petitioner received notice of the charge and an opportunity to defend, in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3).

Petitioner is required to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioner has failed to do so.

Petitioner first raised his federal constitutional claims of a violation of the ex post facto clause and a denial of due process in a footnote in his petition for rehearing after the judgment of the Supreme Court of Illinois. (Pet. Br. 14 n. 14).

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient to invoke federal jurisdiction unless the court actually

entertains the petition and expressly decides the question. Consolidated Turnpike Company v. Norfolk and Ocean View Railway Company, 228 U.S. 326, 334 (1913). As the Illinois Supreme Court denied the petition in the instant case without entertaining the federal question (Pet. App. B, 13a), the general rule precludes review by this Court. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and is accordingly denied. Consolidated Turnpike, 228 U.S. 326, 333-334 (1913).

In an attempt to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioner erroneously claims that his case fits within an exception to the

general rule. (Pet. Br. 13). In order to fit within the exception, petitioner must show that the Supreme Court of Illinois rendered an unexpected decision, giving him no prior opportunity to anticipate or assert his federal claim, and that the petition for rehearing constituted his first and only chance to present the matter to the state court. Herndon v. Georgia, 295 U.S. 441, 444 (1935); Brinkerhoff-Farris Trust Company v. Hill, 281 U.S. 673, 677-678 (1930); Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930).

Petitioner clearly does not fit within the exception. First, Illinois Supreme Court Rule 7-110(a), prior to being amended, prohibited the giving or lending of anything of value to a judge, official, or employee of a tribunal. Ill. Rev. Stat. ch. 110A, Art. VIII, Rule 7-110(a)(1980). Petitioner knew that

giving a thing of value to a judge or an official was wrong. Thus, Petitioner cannot now claim that the Illinois Supreme Court's decision was unexpected or a surprise. Second, Petitioner is bound to anticipate that prior decisions in similar cases will be applied to his case. Herndon v. Georgia, 295 U.S. 441, 446 (1935). Petitioner knew of the Illinois Supreme Court's decisions in In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988) and In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), on June 20, 1988. Yet, Petitioner did not amend his pleadings to bring a constitutional issue to the attention of the Illinois Supreme Court before it rendered its decision in Petitioner's case on December 15, 1988. Rather, Petitioner relegated his constitutional claim to a footnote in his petition for rehearing. Petitioner plainly failed to preserve a federal

question in the proceedings below and cannot now feign ignorance of the decisions in Corboy and Ketchum. Thus, Petitioner's contention that his petition for rehearing was his first opportunity to raise a federal question is without substance.

II. PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONER FOR HIS REPEATED VIOLATIONS OF LONG ESTABLISHED ETHICAL PRINCIPLES DID NOT VIOLATE THE EX POST FACTO CLAUSE OR THE DUE PROCESS REQUIREMENT OF THE UNITED STATES CONSTITUTION.

The state courts have the inherent authority to regulate attorney discipline. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). The Illinois Supreme Court has the exclusive power to discipline attorneys who have been admitted to practice before it. People ex. rel. Brazen v. Finley, 119 Ill.2d 485, 519 N.E.2d 898 (1988); In re Mitan, 75 Ill.2d 118, 387 N.E.2d 278

(1979), cert. denied, 444 U.S. 916 (1979).

Petitioner incorrectly contends that the Illinois Supreme Court violated the ex post facto clause of the United States Constitution by retroactively applying a new standard to his conduct. Petitioner, however, fails to understand that the Illinois Supreme Court did not apply a new standard to his conduct.

Petitioner was disbarred from the practice of law for paying for more than $10,000.00 worth of car rental charges on behalf of numerous Circuit Court of Cook County judges and public officials of the City of Chicago. The Illinois Supreme Court concluded that Petitioner violated Rule 7-110(a) of the Illinois Code of Professional Responsibility, as amended in In re Corboy, et. al., 124 Ill.2d 29, 528 N.E.2d 694 (1988). Prior to Corboy, Illinois lawyers were strictly prohibited

from giving anything of value to judges except for campaign contributions to designated judicial campaign committees. Id. at 37, 528 N.E.2d at 697. In Corboy, the Illinois Supreme Court amended Rule 7-110(a) to comport with Rule 65 of the Code of Judicial Conduct. Id. As amended, Rule 7-110(a) permits gifts and loans to judges from lawyers if the Code of Judicial Conduct permits the judges to accept the gift or loan. Id. at 44, 528 N.E.2d at 701.

The Illinois Supreme Court further concluded that Petitioner engaged in conduct in which he failed to avoid the appearance of professional impropriety. The Illinois Supreme Court found Petitioner's practice of acting as a "travel agent" for decisionmakers an intolerable practice. The Court concluded that Petitioner's contrived activities gave the impression that he

could purchase favors from judges and officials. His blatant influence peddling was so egregious as to warrant disbarment.

This court has long held that the ex post facto clause of the United States Constitution applies only to laws prohibiting criminal conduct. Bankers Trust Company v. Blodgett, 260 U.S. 647 (1923). A disciplinary proceeding is not criminal in nature. In re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434U.S. 829 (1977). Cf., In re Ruffalo, 390 U.S. 544 (1968). (Disciplinary proceedings described as quasi-criminal in nature).

Even if the ex post facto clause applies to disciplinary proceedings, it does not apply to the case at bar. The cases that Petitioner cites in support of his claim that the decision of the Illinois Supreme should be barred by the

ex post facto clause as applied through the Due Process Clause are easily distinguished from Petitioner's case. First, in Sexton v. Supreme Court Committee on Professional Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988), an attorney was charged with a violation of the Model Rules of Professional Conduct that had not been adopted at the time of his misconduct. There, the court held that the attorney could not be charged with a violation of a rule that did not even exist at the time of his misconduct. Sexton, 747 S.W.2d at 96 (1988). Second, in In re Inquiry Concerning A Judge, No. 77-16, 357 So.2d 172 (1978), a judge engaged in conduct unbecoming a member of the judiciary prior to the amendment of the rule which prohibited the misconduct. The judge was charged with a violation of the amended rule only. Id., 357 So.2d at 174. Thus, in the cases advanced by

Petitioner, the Respondent's were charged with violations of rules that did not exist at the time of their misconduct.

In the instant case, the rule prohibiting Petitioner's activity existed at the time of his misconduct. Unlike the Sexton and In re Inquiry cases, Petitioner's activity in this case was wrong under Rule 7-110(a) prior to its amendment and wrong under 7-110(a), as amended. This Court has held that in order for the ex post facto clause to apply to a law, the law must be more burdensome than the prior law. Dobbert v. Florida, 432 U.S. 282, 294 (1977). Under any analysis of former or amended Rule 7-110(a), Petitioner's loans were improper.

Petitioner next erroneously argues that the Supreme Court of Illinois violated the Due Process Clause of the United States Constitution. Again,

Petitioner's argument fails. In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both requirements have been met. Respondent had notice that he was charged with making and soliciting proscribed loans to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner.

In support of his due process argument, Petitioner relies on this Court's holding in Bouie v. Columbia, 378 U.S. 347 (1964). Bouie, however, is readily distinguishable. In Bouie, it was found that due process was violated because a state's interpretation of a criminal statute punished conduct which was not criminal at the time the act was

committed. Therefore, the defendants lacked fair warning that their conduct was prohibited. In the case at bar, Petitioner knew the Administrator had charged him with numerous violations of Rule 7-110(a). That rule existed in Illinois as a rule of court since 1980. Petitioner knew that his many loans to judges were considered prohibited. He cannot now argue lack of notice.

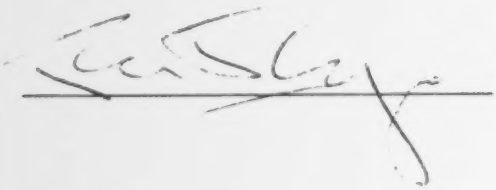
In summary, the Petitioner failed to preserve a federal question below. His arguments constitute transparent attempts to invoke the jurisdiction of this Court. The procedure employed by the Illinois Supreme Court did not violate the ex post facto provision of the United States Constitution or the Due Process Clause. Petitioner's actions were prohibited under the disciplinary rules at the time of his misconduct. This Court should not allow Petitioner's purported ignorance of

his ethical responsibility delay the disciplinary process in the Illinois Supreme Court.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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MOTION FILED
JUL 28 1989

(3)

No. 88-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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July 29, 1989

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CHAS. P. YOUNG COMPANY

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II. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE EX POST FACTO CLAUSE APPLIES TO DISBARMENT PROCEEDINGS.

III. THIS COURT SHOULD GRANT THE WRIT TO REAFFIRM THAT DUE PROCESS PROHIBITS UNFORESEEABLE JUDICIAL EXPANSION OF PUNITIVE PROVISIONS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Illinois Attorneys for Criminal Justice ("IACJ") hereby move for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The consent of the Petitioner has been obtained. The consent of the Respondent was requested but refused.

STATEMENT OF INTEREST

IACJ is an independent non-profit organization of criminal defense lawyers, whose stated purpose is to promote justice and dignity for criminal defendants, their lawyers, and for the criminal justice system itself. IACJ, through its publications and other resources which serve the criminal defense bar, seeks to foster and maintain the integrity, independence and expertise of criminal defense lawyers in Illinois. Consistent with these purposes, IACJ makes frequent appearances as *amicus curiae* in cases of importance.

The case at bar is such a case. Here, Petitioner has been disbarred from the practice of law by the Illinois Supreme Court for making rental car reservations for judges and non-judicial public employees in 1981-1984. This ultimate sanction was imposed even though Petitioner's conduct with respect to certain judges was adjudicated under the aegis of a wholesale amendment of a disciplinary rule which was not promulgated until years *after* the conduct complained of occurred. Even more egregiously, Petitioner's conduct with

respect to non-judicial public employees was expressly relied upon by the Court below as a basis for disbarment despite the fact that *no* disciplinary rule existed governing such conduct at the time it occurred.

REASON FOR BRIEF AMICUS CURIAE

The result reached by the Illinois Supreme Court in the instant case depended upon the application of a species of *ex post facto* legislation; IACJ is therefore greatly concerned that a dangerous precedent has been set which tramples elementary principles of fairness and equity. The Illinois Supreme Court's unprecedented action affects all segments of the bar, and attorneys in Illinois must now live with the threat of disciplinary proceedings to review conduct thought to be innocent at the time it occurred. IACJ believes that this dangerous precedent abridging fundamental rights without fair warning must be constrained. As an organization of attorneys that represents criminal defendants and serves the interests of the entire criminal justice system, IACJ is alarmed by the manner in which the Illinois Supreme Court applied newly promulgated disciplinary rules to penalize Petitioner's past conduct.

CONCLUSION

Through its efforts to maintain the integrity of the criminal justice system, IACJ has an abiding interest in the fair and uniform administration of justice in the State of Illinois, and the protection of citizen's rights against the arbitrary and unjust exercise of legislative power in derogation of individual rights. Because of the importance of the issues raised in the present case, and their implications for individual rights, IACJ respectfully requests leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

Illinois Attorneys for
Criminal Justice

By Its Attorney,

Jed Stone

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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July 29, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

Please see the Motion for Leave to File Brief *Amicus Curiae*, *supra*, for the Statement of Interest of Illinois Attorneys for Criminal Justice in this case.

REASONS FOR GRANTING THE WRIT

This case involves the permanent disbarment of Petitioner Oscar O. D'Angelo from the practice of law in the State of Illinois. The court below imposed the ultimate professional sanction by retroactively applying a disciplinary rule governing gifts to judges promulgated in 1988 to Petitioner's conduct in 1981-84. *See In Re D'Angelo*, 126 Ill.2d 45, 53-56, 533 N.E.2d 861, 864-66 (1988). Even more inexplica-

bly, Petitioner's conduct with respect to non-judicial public employees was penalized in the absence of any disciplinary rule regulating an attorney's relationship with such public officials. *Id.* at 56-57, 533 N.E.2d at 866-867.

The latter aspect of the decision below was unprecedented and patently unforeseeable: Before this case, there was simply no rule which even addressed, let alone prohibited, transfers of value from an attorney to a non-judicial public official. Plainly, too, the Illinois Supreme Court's application of its 1988 amendment of the disciplinary rule governing gifts to judges[1] to Petitioner's conduct in 1981-84 was arbitrary and wholly unforeseeable.

This Court has just recently granted a petition for a writ of certiorari to review the Illinois Supreme Court's abridgement of First Amendment rights in an attorney discipline case. *Peel* v. *Attorney Registration and Disciplinary Commission of Illinois*, 126 Ill. 2d 397, 534 N.E.2d 980 (1989), *cert. granted*, 58 U.S.L.W. (July 3, 1989) (No. 88-1775). As in that case, the decision below implicates vital constitutional principals. First, the actions of the Illinois Supreme Court contravened the express prohibition in Article I, Section 10 of the United States Constitution that "no State shall pass any *ex post facto* law." Second, the court's actions infringed the Due Process Clause of the Fourteenth Amendment, which prohibits the retroactive application of an unforeseeable judicial construction of a statute which expands the scope of prohibited conduct.

By imposing a professional death sentence on Petitioner in the manner outlined above, the Illinois Supreme Court reached beyond its constitutional limits. And the court turned an unfortunate prediction into a reality. As forecast, Petitioner has been "offered as a sacrificial goat for the Bar, to satisfy its own need of demonstrating to the public that

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[1] Rule 7-110(a) of the Illinois Code of Professional Responsibility.

the Bar is cleansing its own house."[2] This Court should grant the writ and give Petitioner the opportunity to be judged fairly.

I. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE EX POST FACTO CLAUSE APPLIES TO LEGISLATIVE ACTS OF A COURT.

Although this Court has held that the Ex Post Facto Clause applies directly only to legislative acts,[3] the question in the present case is whether the Clause should apply to the legislative acts of a court. It should.

It cannot be seriously disputed that the court below, when it promulgated its new Rule 7-110(a) in June 1988, was acting in a legislative capacity.[4] The Illinois Supreme

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[2] Opinion of the Chair of the Hearing Board, Petition at App. 43a. The Chairperson's warning expressed a concern that Petitioner, a prominent Chicago attorney, should not become a scapegoat for those who have been justifiably outraged at the revelations of judicial corruption revealed by the federal government's undercover investigation of the Cook County, Illinois court system. Unfortunately, Petitioner, who was not even called as a witness in any of the trials resulting from this investigation, has apparently become such a scrapegoat.

[3] *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Ross* v. *Oregon*, 227 U.S. 150 (1913).

[4] The Illinois Supreme Court adopted this new disciplinary rule in *In Re Corboy*, 124 Ill. 2d 29, 528 N.E.2d 694 (1988). Before the *Corboy* decision, Rule 7-110(a) provided that "[a] lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal. . . ." Although the old rule, on its face, appeared to be absolute, the Illinois Supreme Court had expressly acknowledge that "the limits [of the rule] had not been defined and this lack of definition [had] created uncertainty among practicing attorneys as to precisely what conduct [was] prohibited." *In Re Jones*, 125 Ill.2d 371, 381, 532 N.E.2d 239, 244 (1988). As the Court further noted, there has been "considerable belief among members of the bar" that the old rule did not establish a flat *per se* ban gifts to judges, but rather prohibited only those gifts "moti-

(footnote continued on next page)

Court's promulgation of rules governing attorney conduct is distinctly legislative. Indeed, as regards its rule-making and legislative capacity, the Illinois Supreme Court recently reaffirmed that it has the "sole authority to regulate and discipline attorney conduct" and "possesses the inherent and exclusive power to regulate the practice of law in this State." *People ex rel. Brazen* v. *Finley*, 119 Ill.2d 485, 492-493, 519 N.E.2d 893, 901-902 (1988); *see also In Re Day*, 181 Ill. 73, 54 N.E. 646 (1899); *In Re Mitan*, 119 Ill.2d 229, 518 N.E.2d 1000 (1987).

As this court has recently held, state courts can legislate.[3] And state courts necessarily exercise legislative power in promulgating disciplinary rules. The Illinois Supreme Court indisputably exercised its legislative power in *Corboy* by expressly announcing a new rule of general applicability which imposed standards on all members of the bar, exactly as a legislature would function in enacting a statute. The court also exercised its legislative power, albeit in a less straightforward way, when it held below that it is a sanctionable exercise of "clout" for an attorney to give something of value to a non-judicial public official. *See In Re D'Angelo*, *supra*, at 56, 533 N.E.2d at 866.

(footnote continued from preceding page)

vated by an intent to influence." *In Re Corboy*, *supra*, at 38, 528 N.E.2d at 698. In *Corboy*, the court expressly amended the old rule to specifically identify the types of gifts to judges which were permissible. All others were henceforth prohibited. *Id.* at 40-45, 528 N.E.2d at 698-701. In *Corboy*, though, the court declined to apply the new rule retroactively since "it would be unfair to apply the limitation we have today for the first time defined to . . . conduct [which occurred] in 1981." *Id.* at 49, 528 N.E.2d at 700. Despite this sensitivity to the problems inherent in the retroactive application of its new rule, the court below nevertheless judged Petitioner under the new rule, even though it did not exist at the time of the conduct at issue.

[3] *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731 (1980).

Since a court which issues disciplinary rules of general applicability is clearly acting as a legislature, the constitutional rules which apply to legislative acts should perforce govern the promulgation of such rules. The Ex Post Facto Clause should, therefore, be applied to the legislative acts of the court below.

II. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE EX POST FACTO CLAUSE APPLIES TO ATTORNEY DISCIPLINARY PROCEEDINGS.

This case presents the issue of whether the Ex Post Facto Clause, which has long been held applicable only to criminal proceedings,[6] should apply to attorney disciplinary proceedings. While this Court has recognized that such proceedings are "adversary proceedings of a quasi-criminal nature," and that disbarment "is a punishment or penalty imposed on the lawyer," *In Re Ruffalo*, 390 U.S. 544, 550-551 (1968), there is nevertheless a distinct split in the Circuit Courts of Appeal as to the nature of disciplinary proceedings.

The District of Columbia, Fifth and Eighth Circuits have recognized that such proceedings are quasi-criminal in nature;[7] while the Third, Seventh, and Ninth Circuits have ruled that disciplinary proceedings are neither criminal nor

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[6] *Calder* v. *Bull*, 3 U.S. (Dall.) 386 (1798); *Bankers Trust Corp.* v. *Blodgett*, 260 U.S. 647 (1923); *Galvan* v. *Press*, 347 U.S. 522 (1954).

[7] *In Re Thalheim*, 853 F.2d 383 (5th Cir. 1988) ("attorney disbarment and suspension cases are quasi-criminal in character; therefore, court's disciplinary rules must be read strictly, resolving any ambiguity in favor of attorney); *Charlton* v. *FTC*, 543 F.2d 903 (D.C. Cir. 1976) ("disciplinary proceedings are adversary proceedings of quasi-criminal nature and disbarment, designed to protect public, is punishment or penalty imposed on lawyer"); *Goodrich* v. *Supreme Court of South Dakota*, 511 F.2d 316 (8th Cir. 1974) ("state disbarment proceedings are quasi-criminal in nature").

civil.[8] The Second Circuit has held that a "court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding," since "for most attorneys the license to practice law represents their livelihood, the loss of which may be greater punishment than a monetary fine." *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209-10 (2d Cir. 1972).

Some courts have held that the Ex Post Facto Clause is not applicable to disciplinary proceedings, yet other courts have reasoned that to impose disbarment retroactively would be unjust when applied to conduct that was not clearly prohibited when it took place. These Courts have therefore applied the principles of the Ex Post Facto Clause to disciplinary proceedings without specifically invoking the Clause.[9]

The Ex Post Facto Clause's strict limitation to criminal cases has thus created judicial tension in disciplinary proceedings as courts strive to avoid patently unjust results caused by retroactive application of disciplinary rules. This Court should grant the writ to resolve this tension and to make clear that the Ex Post Facto Clause applies to attorney disciplinary proceedings.

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[8] *In Re Ross*, 735 F.2d 1168 (9th Cir. 1984) ("nature of disciplinary proceeding is neither civil nor criminal, but an investigation into conduct of lawyer-respondent"); *In Re Abrams*, 521 F.2d 1094 (3rd Cir. 1975) ("although disbarment proceeding is not criminal in nature, its consequences remove it from ordinary run of civil cases"); *In Re Echeles*, 430 F.2d 347 (7th Cir. 1970) ("disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers").

[9] *See, e.g., Sexton* v. *Supreme Court Committee on Professional Conduct*, 747 S.W.2d 94 (Ark. 1988) (attorney's conduct could not be subject to retroactive examination under a new rule); *see also In Re Inquiry Concerning a Judge*, 357 So.2d 172 (Fla. 1978) (retroactive application of newly promulgated rule to judge's past conduct would violate due process).

III. THIS COURT SHOULD GRANT THE WRIT TO REAFFIRM THAT DUE PROCESS PROHIBITS UNFORESEEABLE JUDICIAL EXPANSION OF PUNITIVE PROVISIONS.

The Due Process Clause of the Fourteenth Amendment forbids the retroactive application of an unforeseeable judicial expansion of punitive provisions. When courts unforeseeably expand rules to embrace conduct not previously covered, due process precludes the retroactive application of the new interpretation.

This Court first articulated the foregoing principle in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, this Court reversed the South Carolina Supreme Court's construction of a trespass statute, concluding that the court's action was so unforeseeable that individuals were not provided fair warning that their conduct violated the law.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. [378 U.S. at 352-354.]

As stated in *Bouie*, due process bars "retroactive criminal prohibitions emanating from courts as well as legislatures." *Id.* at 354.

Bouie has been liberally construed as applying *ex post facto* principles to judicial decisions under the rubric of due process. As one court has noted, "[a]lthough the *ex post facto* prohibition * * * literally applies only to legislative acts, the Supreme Court has incorporated the principle upon which the prohibition rests into the due process clause of the Fifth and Fourteenth Amendments."[10]

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[10] *Knapp* v. *Cardwell*, 667 F.2d 1253, 1262 (9th Cir. 1982).

The due process significance of prior notice in disciplinary proceedings has been recognized by this Court. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court stated that " '[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed,' " and that "it may well be" that disbarring an attorney for the violation there at issue would raise "significant due process concerns." 471 U.S. at 653 n.15.

Such concerns are raised by the action of the court below. Even if these actions were not legislative in nature; even if Petitioner's disciplinary proceedings were not quasi-criminal; the decision of the court below nevertheless violated fundamental notions of due process. This Court should grant the writ to reaffirm that the due process principles first enunciated in *Bouie* apply with full force in attorney disciplinary proceedings.

* * *

Petitioner has been subjected to the ultimate professional sanction of disbarment for conduct that was not prohibited when it occurred. The Supreme Court of Illinois announced a new disciplinary rule in *Corboy*, and then applied that rule retroactively to disbar Petitioner. The court itself expressly recognized the potential for injustice in choosing not to apply the new rule retroactively to the attorneys before it in *Corboy*; yet it did just that to Petitioner. Moreover, and perhaps even more outrageously, the court below punished Petitioner's conduct with non-judicial public employees, even though there was no rule prohibiting or even regulating such conduct at the time it occurred.

The court's retroactive application of its newly-announced rule and its unforeseeable construction of existing rules not only deprived Petitioner of his livelihood, these unprecedented actions also directly implicate important constitutional principles under the Ex Post Facto and Due Process Clauses.

CONCLUSION

For the reasons stated above, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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88-2130

JUL 28 1989

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR O. D'ANGELO,

Petitioner,

vs.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

MOTION OF AMICUS CURIAE THE JUSTINIAN SOCIETY OF LAWYERS FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THE JUSTINIAN SOCIETY OF LAWYERS

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150.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

OSCAR O. D'ANGELO,

Petitioner,

-Vs-

ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION,

Respondent.

MOTION OF AMICUS CURIAE
THE JUSTINIAN SOCIETY OF LAWYERS
FOR LEAVE TO FILE BRIEF

Now comes amicus curiae, The Justinian Society of Lawyers (the "Society"), and moves this Honorable Court, pursuant to the Court's Rule 36, for leave to file a brief in this cause, and in support thereof states as follows:

1. The Society is a professional organization of lawyers admitted to practice law in the State of Illinois, and has been

organized under the laws of the State of Illinois for over 65 years.

2. Review of the decision of the Illinois Supreme Court in petitioner's case has raised questions in the minds of the members of the Society as to the disbarment imposed upon petitioner through the application of Illinois Disciplinary Rule 7-110(a), when that court itself has stated, in a separate case, that the limits of that rule had, at the time of petitioner's conduct, "not been defined and this lack of definition created an uncertainty among lawyers as to precisely what conduct [the rule] prohibited." In re Jones, 125 Ill.2d 371, 381, 532 N.E.2d 239, 244 (1988).

3. The Society also shares the views of leading and responsible citizens who know and have worked with petitioner, including fellow attorneys, who have come forward to

respectfully raise their bewilderment at the disbarment imposed in this case.

4. The Society recognizes the awesome responsibility imposed upon the courts of every state in these troubled times to maintain the integrity of the legal profession and protect the public from inappropriate conduct of attorneys. It believes, however, that it must add its voice to the number of those who have spoken out since the Illinois Supreme Court's decision in this case, not only because respondent has been a respected member of the legal community for so many years, but because the members perceive a substantial difficulty in understanding the recent decisions of the court below on the subject of Rule 7-110(a).

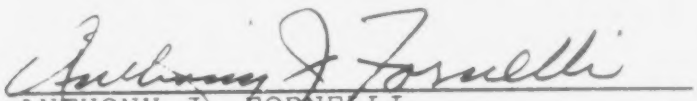
5. Respondent, the Illinois Attorney Registration and Disciplinary Commission,

has not consented to the filing of this brief.

6. The Society believes that the brief it desires to file will be helpful to the Court in its consideration of this matter.

WHEREFORE, the Society prays that this Honorable Court grant it leave to file its brief as amicus curiae, a copy of which brief is submitted herewith.

Respectfully submitted,



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STATUTUES:

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IN THE
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OSCAR O. D'ANGELO,

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-Vs-

ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION,

Respondent.

BRIEF OF AMICUS AMICUS CURIAE THE JUSTINIAN SOCIETY OF LAWYERS

Now comes amicus curiae, The Justinian Society of Lawyers (the "Society"), and submits to this Honorable Court, pursuant to the Court's Rule 36, its brief, in this cause.

THE INTEREST OF THE SOCIETY

As set forth in its motion for leave to file this brief, the Society of Lawyers is a professional organization of lawyers

admitted to practice law in the State of Illinois, and has been organized under the laws of the State of Illinois for over 65 years.

The Society urges the Court to grant the petition for leave to appeal. Review of the proceedings in this case and of the decision of the Illinois Supreme Court has raised questions in the minds of the members of the Society as to the disbarment imposed upon petitioner through the application of a disciplinary rule when that court itself has stated, in a separate case, that the limit of that rule had, at the time of petitioner's conduct, "not been defined and this lack of definition created an uncertainty among lawyers as to precisely what conduct [the rule] prohibited." In re Jones, 125 Ill.2d 371, 381, 532 N.E.2d 239, 244 (1988).

The rule which petitioner was held to have violated was Illinois Disciplinary Rule

7-110(a), concerning the giving or lending by an attorney of anything of value to a judge.

The Society also shares the views of leading and responsible citizens who know and have worked with petitioner, including his fellow attorneys, who have come forward to respectfully raise their bewilderment as to the imposition of disbarment in this case.

The Society recognizes the awesome responsibility imposed upon the courts of every state in these troubled times to maintain the integrity of the legal profession and protect the public from inappropriate conduct of attorneys. It believes, however, that it must add its voice to the number of those who have spoken out since the Illinois Supreme Court's decision in this case, not only because

respondent has been a respected member of the legal community for so many years, but because the members perceive a substantial difficulty in understanding the recent decisions of the court below on the subject of Rule 7-110(a).

SUMMARY OF ARGUMENT

The Society argues that petitioner's right to due process was violated when he was disbarred for conduct which occurred before he had been given fair warning that the conduct was prohibited and would subject him to sanction.

ARGUMENT

I.

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE HE WAS NOT GIVEN FAIR WARNING THAT HIS CONDUCT WAS PROHIBITED.

Few cases have raised more questions in the legal community in Illinois than those

consolidated cases styled In re Corboy, 124 Ill.2d 29, 518 N.E.2d 894 (1988). The confusion attendant to the appropriate interpretation of Rule 7-110(a) led to continuous debate within the profession which was addressed by the court below in Corboy and the court's amendment to the rule promulgated in Corboy. In Corboy, six lawyers of local and national prominence engaged in conduct which they believed was perfectly appropriate and even charitable and yet were found to have violated an ethical rule, although the court below discharged the attorneys without discipline because they had varying professional and special relationships with the judge in question and his family, and "acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they had acted properly." In re Corboy, supra, 528 N.E.2d

at 701. Similarly, the attorney in In re Jones, supra, was also not disciplined although there was a loan to a judge of $15,000 during a time when his firm was likely to have a case before the judge.

It is the understanding of the Society that petitioner here was motivated to provide access to rental cars by similar long-term social relationships with judges and non-judicial persons and was under a similar misapprehension of Rule 7-110(a). Indeed, petitioner's reputation for extraordinary acts of charity and benevolence is well known to the Society and the community at large.

The court below has imposed the maximum possible sanction--disbarment--for the violation of a rule which had been enacted but had never been clarified or interpreted by the court below. The rule, though broad in its terms, had been understood to include

exceptions. In Corboy, years after the conduct for which petitioner was disbarred, the court below "rewrote" the rule, and clarified and explained it. However, in petitioner's case, the court ordered a disbarment for conduct found by the court to violate the very rule it had only recently addressed.

Even more perplexing to the Society is the way the court has applied the newly interpreted rule in what appears to the Society to have been an inconsistent manner. For example, in In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), the court below found that an attorney had made several loans over a substantial time period and "intended to and did in fact" receive benefit from the loans to the judge. The lawyer received a suspension of two years. But petitioner, even if we assume the same intent and benefit, was disbarred.

And in In re Karzov, 126 Ill.2d 33, 533 N.E.2d 856, 860 (1988), the attorney made a loan to a judge and the court below found his "motives in making the loan. . . designed to influence (the judge) in judicial decisions," and imposed an 18-month suspension.

The Society submits to this Court that it is not surprising that inconsistent results are reached when a court attempts to impose discipline for violations of a rule which had, even in that court's own view, never been made clear to the members of the bar. In this case, the court first clarified the rule, including within the prohibited conduct actions which had not been clearly prohibited when it occurred, and then disbarred petitioner for the conduct. This was precisely the type of result this Court in Bouie v. City of Columbia, 378 U.S. 347 (1964),

prohibited. In Bouie, this Court confirmed the principle that the deprivation of the right to fair warning is barred by the requirement of due process.

II.

THE COURT BELOW VIOLATED PETITIONER'S RIGHT TO DUE PROCESS WHEN IT IMPOSED DISCIPLINE BECAUSE OF GIFTS OR FAVORS TO PUBLIC EMPLOYEES AND BECAUSE IT FOUND A VIOLATION OF CANON NINE.

The Society finds equally disquieting that portion of the Illinois Court's decision which found petitioner's conduct relating to non-judicial public employees inappropriate because it gives "the impression of one trying to influence decision-makers in all areas of the city and county government." (Opinion, p. 8). The Society agrees that "an attorney's professional conduct must be above reproach. . . " but the Society is not aware of any disciplinary

rule which forbade an Illinois attorney to make a rental car available to a public employee whom the attorney knows or has befriended. If Canon 9 of the Code, that "A lawyer should avoid even the appearance of professional impropriety" (107 Ill.2d Canon 9), means that a lawyer is unehtical if he "gives the impression" by his activity that he is trying to influence decisionmakers, a whole segment of the practicing bar has acted similarly. Lawyer lobbyists, for example, do precisely what appears now to be forbidden, but which has never previously been forbidden.

For the court below to disbar petitioner for (or to take into consideration as a factor in imposing disbarment rather than a lesser sanction) conduct which had absolutely no relationship with Rule 7-110(a) and which is not violative of any express rule of disciplinary conduct, because in the

court's view such conduct falls under the all-encompassing standard of Canon 9, is equally violative of due process, as it imposes penalties without fair warning. This is particularly true when the Illinois court itself has recently stated that Canon 9 "is not a standard of discipline in itself but expresses the policy considerations underlying the disciplinary rules contained within Canon 9." In re Powell, 126 Ill.2d 15, 533 N.E.2d 831, 836 (1988).

CONCLUSION

Amicus curiae, The Justinian Society of Lawyers, respectfully states that this Court should grant the petition for writ of certiorari and clarify the standards to be met by a court in affording due process to an attorney who is charged with violations of disciplinary rules which were not clear and which had neither been understood by the

bar nor stated by the court to include the conduct in question at the time the conduct occurred.

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No. 88-2130

In The Supreme Court of the United States October Term, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

MOTION AND BRIEF AMICUS CURIAE OF THE ILLINOIS STATE BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In The
Supreme Court of the United States
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OSCAR O. D'ANGELO,

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v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

MOTION OF THE ILLINOIS STATE BAR ASSOCIATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 36.1 of this Court, the Illinois State Bar Association (ISBA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Movant has been unable to secure the consent of respondent.

The ISBA is a bar association of 32,000 members throughout the state of Illinois. The ISBA has concentrated its efforts on the improvement of the judicial process. The ISBA believes that the decision below is threatening to lawyers who would become subject to disciplinary sanctions on the basis of after the fact

amendments and interpretations to court rules by means of decision disbarring an attorney. The ISBA also views the decision below as threatening its members with unfair procedures in the considerations of sanctions. The ISBA believes that its views will be helpful to the Court in emphasizing the importance of this petition.

Respectfully submitted,

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QUESTION PRESENTED

The Illinois State Bar Association's interest as amicus is whether fundamental notions of due process and equal protection of the law are violated by the imposition of disbarment on an attorney for conduct which the Illinois court finds for the first time is a significant factor warranting disbarment - the giving of something of value to public officials or employees, without any showing of illegality or frustration of public policy, especially where other attorneys have escaped sanctions because "[t]hey acted without guidance of precedent or settled opinion . . . ."

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BRIEF AMICUS CURIAE OF THE ILLINOIS STATE BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Interest of Amicus

The Illinois State Bar Association (ISBA) respectfully submits this brief as amicus curiae in support of petitioner.

The ISBA considers the Illinois Supreme Court's opinion of paramount importance to all attorneys in Illinois. The ISBA does not address the propriety of respondent's conduct or the sanction imposed. Rather, the ISBA is concerned with the court's retroactive application of its holding that giving something of value to a public official is improper and subjects an attorney to sanctions under Illinois' Code of Professional Responsibility.

(Ill.Rev.Stat. ch. 110A, Rule 1-101 *et. seq.*)

That such conduct may be *per se* improper was without precedent in the Illinois Disciplinary Rules, the Code of Professional Responsibility or relevant case law. Moreover, the court's opinion fails to articulate any guidelines for interpretation or application of this newly announced standard.

Statement of the Case

Amicus adopts the statement by petitioner in his Petition, pp. 3-14.

Summary of Argument

The ISBA limits its amicus interest to the Illinois court's finding that giving something of value to public employees or officials, *per se* constitutes a violation of the Illinois Code of Professional Responsibility warranting disbarment.

Substantial constitutional questions have arisen for the first time in the Illinois Supreme Court opinion. Admittedly, no precedent for the ruling existed in Illinois. The retroactive invocation of the newly-engrafted rule to past conduct of petitioner contravenes traditional notions of due process of law. This is especially true when there was absolutely no showing that any illegality or frustration of public policy was involved.

In order to ensure the integrity and fundamental fairness of the disciplinary process, it is incumbent that attorneys, who may be subject to discipline including the loss of license to practice law, be clearly on notice as to what conduct is proscribed. This is particularly important when such proscribed attorney conduct is not prohibited to the public generally or otherwise illegal or against public policy.

Attorneys everywhere ought to be accorded more fundamental fairness than was accorded petitioner at bar regarding the court's holding concerning public employees or officials. The resulting ultimate sanction of disbarment demonstrates the necessity for review by this Court.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ILLINOIS SUPREME COURT ANNOUNCES, WITHOUT ANY GUIDELINES FOR ITS INTERPRETATION OR APPLICATION, A NEW STANDARD OF CONDUCT FOR ILLINOIS ATTORNEYS.

In its decision in this case, the Illinois Supreme Court holds for the first time that giving something of value to public employees and officials, without any showing of illegality or frustration of public policy, constitutes conduct which violates the Illinois Code of Professional Responsibility.

The impact of this decision and its concern to practicing attorneys everywhere is two-fold. First, the court condemned conduct which the Illinois Code did not single out or even hint was improper. Second, retroactive application of this new prohibition read into the Illinois Code may unfairly subject attorneys in Illinois and other states where the issue might arise to discipline for past acts which were not contemporaneously deemed improper.

Due process and equal protection of the law violations arise for the first time in the court's opinion imposing the ultimate sanction of disbarment. It has long been recognized that attorneys have certain rights protected under the Equal Protection and Due Process clauses of the U.S. Constitution. *Spevack v. Klien,* 385 U.S. 511, (1967); *Wilner v. Committee on Character,* 373 U.S. 96 (1963).

Also, this Court has treated state court rules in respect to professional conduct in the same manner as statutes in determining whether due process or equal protection violations have occurred and found substantial constitutional questions arose by reason of a state court's action invoking rules against an attorney. *Konigsberg v. State Bar of California,* 353 U.S. 252, 258 (1957); *Konigsberg v. State Bar of California,* 366 U.S. 36, 45 (1961).

This Court should grant certiorari to determine the retroactivity of state court rulings changing the codes under which

attorneys may be disciplined to conduct not proscribed when the conduct occurred. This Court's ruling is necessary to preserve the integrity and fundamental fairness of state attorney disciplinary systems and clarify the professional standards by which attorneys are to be judged.

A. THE ILLINOIS COURT HOLDS FOR THE FIRST TIME THAT GIVING SOMETHING OF VALUE TO A PUBLIC OFFICIAL OR PUBLIC EMPLOYEE IS *PER SE* IMPROPER CONDUCT WARRANTING DISCIPLINE EVEN THOUGH THE ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DOES NOT PROSCRIBE SUCH ACTIONS.

The ISBA takes no position on the general holding of the Illinois Supreme Court that the conduct of reserving rental cars (and paying for some of the rental car bills) for *judges* supports sanctions for violations of Rules 7-110(a), 1-102(4), 1-102(5), Supreme Court Rule 771 and Canon 9 or on the sanction imposed. (Pet. App. pp. 7a-10a)[1]

The Illinois opinion, however, does not confine itself to addressing such acts. It goes on to hold that "gifts" to public officials also violates the Code. In this respect, the decision is squarely at odds with the same court's decision in *In re Corboy,* 124 Ill.2d 29, 528 N.E.2d 694 (1988), and *In re Powell,* 126 Ill.2d 15, 533 N.E.2d 831 (1988), in that it imposes a sanction on conduct that was never in the annals of disciplinary cases.

In *Corboy,* the Illinois court amended its Rule 7-110(a) (Ill.Rev. Stat. ch. 110 A, rule 7-110(a)) which now states:

> (a) A lawyer shall not give or lend any thing of value to a judge, official, or employee *of a tribunal,* except those gifts or loans which a judge or a member of his family

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[1] The text of the rules involved have been set forth in the petition for certiorari. (Pet. pp. 2-3)

> may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office. (Emphasis ours.)

Corboy, 124 Ill.2d at 46, 528 N.E.2d at 701. In *Corboy*, the Illinois court held for the first time that attorney gifts or loans to *judges*, regardless of the attorney's motive or intent, are prohibited by Illinois Rule 7-110(a), unless the gifts or loans fall within one of the exceptions listed in Rule 65(C) (4) (Ill.Rev.Stat. ch. 110A, Rule 65 (C) (4)) of the Illinois Code of Judicial Conduct or unless it is a contribution to the judge's campaign fund as was always permitted by Rule 7-110(a). *Corboy*, 124 Ill.2d at 41, 528 N.E.2d at 699.

Furthermore, "[t]o provide better guidance to lawyers," the court offered several factors to be taken into account in interpreting the scope of its Rule 7-110(a) in conjunction with Rule 65(C) (4) of the Illinois Code of Judicial Conduct. *Corboy*, 124 Ill.2d at 42, 528 N.E.2d at 699.

And finally and most importantly, although holding that the respondents in *Corboy* violated Rule 7-110(a), as amended by the opinion, the Illinois court declined to sanction the respondents in that case. "They acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they had acted properly." 124 Ill.2d at 45, 538 N.E. 2d at 701.

In this case, on the other hand, the Illinois court holds for the first time that the Illinois Code of Professional Responsibility imposes a strict ban on giving something of value to public employees or public officials. The court does not specify what Illinois Disciplinary Rule or Canon of the Code prohibits such conduct, nor does it cite to any prior cases to demonstrate that respondent was put on notice that his conduct was improper. Nevertheless, the Court applied the new "rule" retroactively, and disciplined respondent for it.

The conduct at issue (providing rental cars to public officials without any showing of intent or motive to influence judicial or quasi-judicial decisions), had not theretofore been deemed

violative of Disciplinary Rule 7-110(a), which relates solely to judges, officials, or employees "of a tribunal." Nor does it violate any other specific provision of the Code. Moreover, this conduct was expressly singled out as aggravation justifying disbarment. (Pet., App. 11a)[2]

Apparently, condemnation of this conduct stems from a violation of Illinois Canon 9 when the Illinois court held:

> [B]y fashioning himself a travel agent for judges and at least 14 elected or appointed officials of the city of Chicago, respondent gave the impression of one trying to influence decision makers in all areas of city and county government. While some may view "clout" as an acceptable means of doing business, we will not condone or tolerate this type of activity.

In re D'Angelo, 126 Ill.2d 45, 56, 533 N.E.2d 861, 866.

But if a violation of Illinois Canon 9 was the basis for the discipline imposed, the Illinois court inexplicably ignored its own pronouncement in *In re Powell* (1988), 126 Ill.2d. 15, 533 N.E.2d 831, announced the same day as *D'Angelo.* There it stated:

> We believe that Canon 9 is not a standard of discipline in itself but expresses the policy considerations underlying the disciplinary rules contained within Canon 9. While respondent's conduct was not only improper but also created the appearance of impropriety, *we nevertheless conclude that Canon 9 does not afford a basis for imposing sanction.* (Emphasis ours.)

Thus, the court's statement in *D'Angelo* is inconsistent with the teaching of *Powell,* announced the same day. Confusion can be the only result.

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[2] The only way the conduct could possibly violate Rule 7-110(a) is if any of the public employees or public officials acted in a quasi-judicial or judicial capacity *vis a vis* respondent or his firm. There was no such evidence presented.

It is respectfully submitted that failure to provide guidelines in advance of any rule changes as created here sets members of the bar "sailing in uncharted waters." *Corboy* (1988), 124 Ill.2d at 49, 528 N.E.2d at 703. It ought not be allowed to stand as authoritative precedent.

B. ANY SUCH NEW READING OF THE DISCIPLINARY CODE SHOULD APPLY PROSPECTIVELY TO AVOID UNJUST CONSEQUENCES.

The Illinois decision condemns conduct relating to nonjudicial persons that many members of the bar were not aware was improper prior to the court's opinion. The effect of the court's decision on attorneys is incalculable. Without any precedent or disciplinary rule to guide them, many attorneys may have *in the past* given things of value to friends in public office. Those attorneys must now live under the threat of disciplinary proceedings and potential sanctions.

The Illinois Supreme Court has not heretofore imposed discipline on attorneys for conduct taken without the guidance of rule, precedent or settled opinion. Indeed, in *In re Friedman*, 76 Ill.2d 392, 397, 392 N.E.2d 1333 (1979), it imposed no sanction on an attorney because he acted without "the guidance of precedent or settled opinion." Similarly, in *In re Luster*, 12 Ill.2d 25, 29, 145 N.E.2d 75 (1957), the court declined to impose any sanction where the attorney relied upon an unreported opinion of the court and where the record indicated that "there were scores of other lawyers and law firms of unquestioned standing who were similarly misled."

The Illinois court reaffirmed this eminently just policy in *Corboy*, citing both *Friedman* and *Luster*:

> "They acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they acted properly . . . It would be unfair to apply the limitation we have today for the first time defined to respondents' conduct in 1981." 124 Ill.2d at 45, 528 N.E.2d at 701.

It is clear that neither the Illinois Code of Professional

Responsibility nor prior decisions of the Illinois court prohibited the *per se* giving of something of value to a public official. Prospective application was the only just result consistent with that court's approach in the past. Indeed, to retroactively apply such a drastic change in the interpretation of the Code violates the constitutional guarantees of due process and equal protection as protected by the 14th Amendment to the United States Constitution.

It is respectfully submitted the Illinois opinion raises many questions as to the giving of things of value by attorneys to public officials. The specter of engrafting newly interpreted conduct onto a disciplinary code as an aggravating factor for sanctions transcends elementary principles of fairness and affects all segments of the bar.

CONCLUSION

The Illinois State Bar Association respectfully urges this Court grant certiorari to Petitioner to articulate the parameters of regulating attorneys by imposition of newly engrafted amendments and interpretations to disciplinary rules thereby rendering past conduct violative of the Illinois code. To simply state the proposition delineates the obvious due process and equal protection implications warranting review by this court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR O. D'ANGELO,
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v.
ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

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On Petition for Writ of Certiorari to the Supreme Court of Illinois

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PETITIONER'S REPLY BRIEF

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1. Respondent Illinois Attorney Registration and Disciplinary Commission ("ARDC") incorrectly argues in its Brief in Opposition ("Opp.") that petitioner failed to timely raise his constitutional claims. But not even the ARDC disputes that federal questions *are* preserved if raised in a petition to rehear a state supreme court decision when that decision unexpectedly implicates federal constitutional claims. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930). *See also PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980). Contrary to the ARDC's analysis, that is precisely what happened below.

Petitioner had no warning that the Illinois Supreme Court would declare his conduct with non-judicial public

officials sanctionable. Prior to the decision below, *no* disciplinary rule prohibited or even addressed such conduct. The ARDC tries to avoid this self-evident fact by blatantly misinterpreting the meaning of "official" in Rule 7-110(a) to include non-judicial public employees.[1] By its express terms, Rule 7-110(a) *only* covers officials "*of a tribunal.*" Non-judicial public employees are simply not within the abmit of the rule. Indeed, as the Illinois State Bar Association's *amicus* brief states, prior to the decision below "the Illinois Code did not single out or even hint [that giving something of value to a non-judicial public employee] was improper." [2]

Petitioner likewise had no warning that the court below would adjudicate his conduct with judges under a wholesale amendment to Rule 7-110(a). The ARDC's argument that petitioner should have amended his "pleadings" below to, in effect, warn the court that it would be unconstitutional to apply the amended rule to his past conduct is absurd. When the court below amended Rule 7-110(a) in *In re Corboy*, 124 Ill. 2d 29, 528 N.E.2d 694 (1988), it expressly declined to apply the amendment retroactively. Petitioner had no reason to believe that the court would ignore this precedent and judge his past conduct under the new standard. Petitioner's constitutional claims first arose when the court below did so, and thus his federal claims were timely raised in his petition for rehearing.

2. Aside from its flawed analysis of the jurisdictional issue, the ARDC's Brief in Opposition is notable only for its omissions. The ARDC does not dispute petitioner's

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[1] Opp. at 13-14.

[2] Brief of *Amicus Curiae* Illinois State Bar Association, at 3. The ISBA thus concludes that "[d]ue process and equal protection of the law violations arise *for the first time* in the court's opinion imposing the ultimate sanction of disbarment." *Id.* (emphasis added). Upon a fair reading of the Illinois Code, this conclusion is inescapable.

statement of the facts of this case. Moreover, the ARDC does not even address the validity of most of petitioner's constitutional claims.

Thus while the ARDC admits that the court below did sanction petitioner for a violation of Canon 9 of the Illinois Code of Professional Conduct,[3] it does not even discuss petitioner's claim that this was patently unforeseeable and thus unconstitutional, since Canon 9 expresses policy considerations only and is not a standard of discipline.

Furthermore, the ARDC does not address petitioner's claim that the court below violated the Ex Post Facto and Due Process Clauses of the United States Constitution when it punished conduct which was not prohibited by (or even the subject of) any disciplinary rule.[4] This aspect of the decision below, standing alone, is sufficient to warrant this Court's review. Even though a prohibition on gifts to non-judicial public employees was completely unforeseeable at the time of the conduct in question, the court below unquestionably sanctioned petitioner in reliance on this heretofore unknown prohibition. The constitutional implications of such jurisprudence are profound, not only to petitioner, but to all Illinois attorneys.

Finally, the ARDC sidesteps petitioner's claim that the retroactive application of the new Rule 7-110(a) to his past conduct with judges violated ex post facto and due process principles. The ARDC admits that the court below judged petitioner under the new rule,[5] but argues

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[3] Opp. at 17-18.

[4] By implying that the term "official" in Rule 7-110(a) includes non-judicial public employees, one might conclude that the ARDC's substantive arguments are intended to apply to non-judicial employees as well as to judges. If so, this back-door maneuver is, at the very least, delusive. As noted above, Rule 7-110(a) in no way addresses conduct with public employees *unless* they are either judges or officials or employees *of a tribunal.*

[5] Opp. at 16.

that this was of no consequence because the conduct was clearly prohibited under the old rule. This argument ignores the fact that, prior to *Corboy*, Rule 7-110(a) had been interpreted by the bar only to prohibit gifts "motivated by an intent to influence."[6] It also ignores the record below, which contains no evidence that petitioner ever intended to influence any judicial decision. Petitioner was entitled to be judged under the ethical standards in effect at the time of his conduct. To do otherwise was to violate petitioner's constitutional rights.

3. Petitioner has been disbarred for conduct that was not prohibited when it took place. The ARDC's Brief does not cast doubt on this plain fact. Ex post facto and due process principles were violated, with far reaching implications for all Illinois attorneys and attorneys around the Nation. The important and recurring constitutional issues raised by the decision below may not be addressed elsewhere, and therefore this Court should grant the writ.

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[6] *In re Corboy*, 124 Ill.2d at 38, 45, 528 N.E.2d at 698, 701.